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No. _____

In The

Supreme Court of the United States

October Term, 1996

DR. MCINTOSH AND DR. VICTORINO,

Petitioners,

v.

RAYMOND JACKSON,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's decisions in *Johnson v. Jones*, ___ U.S. ___, 115 S. Ct. 2151 (1995), and *Behrens v. Pelletier*, ___ U.S. ___, 116 S. Ct. 834 (1996), divest an appellate court of jurisdiction to consider a claim of qualified immunity where the only disputed fact is over a state actor's motive when taking otherwise objectively reasonable action. Does constitutional conduct become unconstitutional when accompanied by forbidden motive, so that qualified immunity is no longer an objective assessment of a state actor's conduct as directed by this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1981).

LIST OF PARTIES

Petitioners are medical doctors who provided medical care to respondent during his incarceration.

Respondent is a state prisoner serving a sentence of life imprisonment. Respondent was incarcerated at the California Medical Facility at the time he filed the underlying complaint in this matter.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Doctors Duncan McIntosh and David Victorino, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 18, 1996. That opinion holds that the appellate court lacked jurisdiction to decide petitioners' qualified immunity based on the holding in *Johnson v. Jones*, ___ U.S. ___, 115 S. Ct. 2151 (1995), because there exists a factual dispute as to whether a delay of respondent's kidney transplant was due to petitioners' personal animosity toward him. Appendix B at App. 9-11. *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996).

The Ninth Circuit held that the legal principles governing the Eighth Amendment were of no avail to the petitioners in this interlocutory appeal because respondent "has alleged the doctors chose to deny him the opportunity for a kidney transplant, not because of an honest medical judgment, but on account of personal animosity." Appendix B at App. 11.[1]

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[1] The decision of the Ninth Circuit seems to reflect their longstanding view that the doctrine of qualified immunity cannot be reconciled with a claim of deliberate indifference under the Eighth Amendment, and that the facts necessary to find qualified immunity are inextricably linked to the merits of an Eighth Amendment claim. See, *Wood v. Sunn*, 865 F.2d 982 (9th Cir. 1988), *vacated upon motion of the parties*, 880 F.2d 1011 (*citing with approval Albers v. Whitley*, 743 F.2d 1372 (9th Cir. 1984), *reversed on other grounds, Whitley v. Albers*, 475 U.S. 312 (1986). Petitioners are unaware of any decision of this Court addressing a claim of qualified immunity in an Eighth

This case presents the Court with an opportunity to address the tension observed by appellate courts between this Court's decisions in *Johnson v. Jones*, ___ U.S. ___, 115 S. Ct. 2151 (1995) and *Behrens v. Pelletier*, ___ U.S. ___, 116 S. Ct. 834 (1996), and the uncertainty surrounding the significance of a state actor's motivation in constitutional torts, specifically within the context of the Eighth Amendment. This Court should conclusively state that objective legal reasonableness shields a state actor from civil rights exposure even when there are disputes over immaterial issues of fact, such as a state actor's motive.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 90 F.3d 330 (9th Cir. 1996) and is reprinted as Appendix B attached hereto.[2] The opinion of the District Court is unreported and is reprinted at Appendix C (Findings and Recommendations) and Appendix D (Order Adopting Findings and Recommendations).

Amendment case, although the Court in *Whitley v. Albers*, 475 U.S. at 327-328, declined to address a qualified immunity defense because the decision held petitioners were entitled to directed verdict on the merits.

[2] The case was first reported at 81 F.3d 112 (9th Cir. 1996). That opinion was amended and superseded when petitioners' request for rehearing was denied. A copy of the original opinion is reprinted as Appendix A.

JURISDICTION

The jurisdiction of this court to review the judgment of the Ninth Circuit by means of certiorari arises under 28 U.S.C. section 1254(1) and Supreme Court Rule 10.1.

CONSTITUTIONAL PROVISION INVOLVED

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. Const. amend. VIII, sec. 1.

STATEMENT OF THE CASE

a. Factual Background

Since March 3, 1981, and continuing to the present, respondent has been incarcerated by the California Department of Corrections. Respondent arrived for his incarceration with kidney failure, or end stage renal disease, and underwent dialysis treatment from 1981 until February 5, 1987, when he received a living-related kidney transplant from his brother.[3] Respondent contends that he suffered pain and medical complications while receiving dialysis between 1981 and his transplant operation in 1987, and that the delay in providing him with a kidney transplant constituted cruel and unusual punishment prohibited by the Eighth Amendment.

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[3] There are two sources of kidneys: cadaver (from a recently deceased individual) and living-related (from a close relative).

(1) Respondent's Medical Treatment

There are two treatment options for patients with end stage renal disease: dialysis (hemodialysis or peritoneal dialysis) and transplantation. Appendix E.[4] Hemodialysis is the most frequently used form of dialysis in the United States and many people are maintained on hemodialysis for extended periods of time, some as long as twenty years. At the present time in the United States alone approximately 95,000 people are being treated with dialysis. Appendix E.

Respondent was provided and continuously maintained on dialysis treatment,[5] until February 5, 1987, when at state expense, he received a living-related kidney transplant from his brother. The quality of respondent's dialysis treatments is unchallenged and not in question. The only issue is whether petitioners' personal animosity

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[4] The court is requested to judicially notice the facts contained in Appendix E pursuant to Fed. R. Civ. P. 201. Appendix E contains pages 6, 9-10 and 20 excerpted from the following book: M. Faris, *When Your Kidneys Fail* (rev. 2d edition, 1991) (published by the National Kidney Foundation of Southern California). A copy of this book was submitted to the district court as Exhibit 8 of defendants' motion for summary judgment filed on April 11, 1994. A description of hemodialysis is also contained in *Payton v. Weaver*, 131 Cal. App. 3d 38, 40-41 (1982) where the court held that a private physician could discontinue dialysis treatment to a patient with end stage renal disease, after sufficient notice, where the patient was grossly noncompliant, even though it was not certain that the patient could obtain treatment elsewhere and could be expected to die without such treatment.

[5] Respondent received continual hemodialysis and occasional peritoneal dialysis.

towards respondent[6] transformed the character of their conduct after they made an initial referral of respondent's case for transplant consideration in April of 1985.

(2) Limitation of Liability

By Order filed August 30, 1994, the District Court granted summary judgment to all defendants, including petitioners, with respect to an alleged Eighth Amendment violation of delaying respondent's transplant during the time from his arrival in the Department of Corrections in 1981 to April 1985. However, the district court denied summary judgment as to petitioners with respect to a claim that they unconstitutionally delayed respondent's transplant during the time period April 17, 1985, when petitioner Dr. McIntosh referred respondent's case to Dr. Levin[7] at the transplant center, until February 5, 1987, when the transplant occurred. Appendix C at App. 80-81.

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[6] The district court held that the matter of any personal animosity was disputed. However, for purposes of this argument only, petitioners admit such animosity but argue that personal motive is irrelevant where adequate care was provided.

[7] Dr. Barry Levin, a non-party who is the Medical Director of the Transplantation Program for California Pacific Medical Center (formerly Pacific Presbyterian Medical Center), was the person with sole responsibility for deciding if respondent should be transplanted. The transplant center staff makes the decision whether to recommend and schedule a transplant. Outside physicians can only refer patients to the center for transplant evaluation.

b. Procedural Background

(1) District Court

Respondent initially filed two separate complaints on June 13, 1990 (CIV S-90-0760 EJG GGH P) and November 26, 1991 (CIV S-91-1624 EJG GGH P) alleging violation of his civil rights pursuant to 42 U.S.C. § 1983. The first complaint (CIV S-90-0760 EJG GGH P) names two defendant employees of the California Department of Corrections: Dr. Duncan McIntosh, a consulting nephrologist[8] and Director of the Hemodialysis Unit at the California Medical Facility, and Dr. Daniel Thor, Chief Medical Officer at California Medical Facility at the time pertinent to this case. Defendants answered the complaint and filed a motion for summary judgment which was granted in part. The court denied defendants' subsequent motion for judgment on the pleadings. The second and related action (CIV S-91-1624 EJG GGH P) named fifteen defendants, including Dr. McIntosh and Dr. David Victorino, the Acting Chief Medical Officer. The court dismissed certain defendants and the remaining defendants appeared by answer. On October 12, 1993, the court consolidated these cases for trial, appointed counsel for respondent, and issued a scheduling order.

On April 11, 1994, defendants filed a motion for summary judgment. On July 25, 1994, the Magistrate Judge issued Findings and Recommendations, granting part of defendants' motion but denying that part of the motion based on defendants' qualified immunity. On

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[8] A nephrologist is a physician who, in part, studies and has clinical experience in the areas of kidney disease, kidney failure, and treatment.

August 30, 1994, the District Judge adopted in full the Magistrate Judge's Findings and Recommendations, thereby denying defendants' motion on the grounds of qualified immunity.

(2) Ninth Circuit

Defendants Dr. McIntosh and Dr. Victorino, the two defendants entitled to qualified immunity, filed an appeal to the Ninth Circuit on September 13, 1994. The matter was argued and submitted August 17, 1995, and the Ninth Circuit filed its original opinion on April 11, 1996. *Jackson v. McIntosh*, 81 F.3d 112 (9th Cir. 1996). Defendants filed a petition for rehearing which was denied. However the court in response issued an amended opinion on July 18, 1996. *Jackson v. McIntosh*, 90 F.3d 330 (9th Cir. 1996). Judgment was entered on the same date.[9]

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[9] The Ninth Circuit's opinion filed April 11, 1996, stated that if plaintiff was able to prove his allegation that defendants chose to deny him the opportunity for a kidney transplant due to personal animosity, then plaintiff would have shown that defendants were deliberately indifferent to his serious medical needs. Subsequent to defendants' request for rehearing (and their argument that a finding of personal animosity alone could not preclude entitlement to qualified immunity), the Ninth Circuit amended its opinion to state plaintiff could prevail at trial if he could prove the course of his treatment was medically unacceptable, even though there was no dispute regarding the care provided while plaintiff was referred for transplant. In the request for rehearing, defendants cited the Ninth Circuit to this Court's decision in *Behrens v. Pelletier*, ___ U.S. ___, 116 S. Ct. 834 (1996), which had been decided after oral argument, and noted its relation to *Johnson v. Jones*, ___ U.S. ___, 115 S. Ct. 2151 (1995), the decision upon which the Ninth Circuit had relied to deny its jurisdiction over the question of qualified immunity.

REASONS FOR GRANTING THE WRIT

This case presents an important question as to whether state officials, in this case medical doctors, can be denied immunity from suit as a result of their personal animosity toward a plaintiff, when the state officials acted in an objectively reasonable manner and violated no clearly established law. In this case the medical treatment was objectively reasonable, and it was wrong and frustrates the purpose of qualified immunity to refuse immunity on the grounds that the treating physicians may have harbored animosity towards respondent. There is no presently existing cause of action for a physician's failure to recommend a patient for a kidney transplant. Consequently, the Ninth Circuit erred in refusing to determine whether the undisputed facts as to respondent's medical care of dialysis, given as an alternative to a kidney transplant, entitled petitioners to a grant of qualified immunity, regardless of any personal animosity towards respondent on the part of petitioners. Seizing upon the immaterial dispute over petitioner's state of mind, the Ninth Circuit reads *Johnson v. Jones*, ___ U.S. ___, 115 S. Ct. 2151 (1995), as depriving the appellate court of jurisdiction to determine if petitioners were entitled to qualified immunity. Consideration of this Court's opinion in *Behrens v. Pelletier*, ___ U.S. ___, 116 S. Ct. 834 (1996), made no difference to the circuit court's decision that it had no jurisdiction.

The district court held that if petitioners' dislike of respondent was the basis for a failure to more actively seek a transplant for respondent after initial referral to the transplant center, it was irrelevant that he was provided with adequate medical care for his condition. The

court incorrectly assumed that plaintiff had an Eighth Amendment right to a kidney transplant. This position is clearly wrong because existing law governing medical malpractice claims, as well as Eighth Amendment cases, do not recognize a cause of action for a physician's failure to recommend a kidney transplant. Respondent can cite no law establishing that the right to a transplant exists. This Court should grant certiorari to demonstrate to lower courts that if a defendant's objective conduct violates no clearly established law, a dispute over the defendant's state of mind is immaterial and does not preclude a finding of qualified immunity.

IMPROPER MOTIVE ALONE CANNOT SERVE AS A BASIS FOR DENIAL OF QUALIFIED IMMUNITY WHERE MEDICAL CARE PROVIDED IS OTHERWISE APPROPRIATE

The Ninth Circuit erred in determining that it lacked jurisdiction, based on the holding in *Johnson v. Jones*, ___ U.S. ___, 115 S. Ct. 2151 (1995), to consider whether petitioners had shown that the treatment provided precluded any finding of deliberate indifference to respondent's medical needs. The Court misapplied the holding in *Johnson* and disregarded the subsequent decision in *Behrens v. Pelletier*, ___ U.S. ___, 116 S. Ct. 834 (1996).

In *Johnson*, the Supreme Court held that a defendant entitled to invoke a qualified immunity defense could not appeal a district court order denying summary judgment insofar as that order determined that the pretrial record set forth a genuine issue of fact for trial. *Johnson* at 2159. Qualified immunity is a purely legal question (i.e.,

whether the law was clearly established or an official's conduct was objectively reasonable) which must be decided *de novo* by the Court of Appeals. *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). However, while the court determines the legal question *de novo*, its review of the evidence is limited to whether the facts established below showed a violation of clearly established law. *Johnson* at 2156.

In *Behrens v. Pelletier*, ___ U.S. ___, 116 S. Ct. 834, 842 (1996), the Court clarified its holding in *Johnson* noting that "[e]very denial of summary judgment ultimately rests upon a determination that there are controverted issues of material fact . . . and Johnson surely does not mean that every denial of summary judgment is nonappealable." The Court further stated that *Johnson* permits petitioner to claim on appeal that all of the conduct which the district court deemed sufficiently supported for purposes of summary judgment met the standard of "objective legal reasonableness" under *Harlow v. Fitzgerald*, 457 U.S. 800 (1981), for purposes of determining qualified immunity. *Behrens* at 842. That is exactly the claim made herein by petitioners.[10]

The district court erred in holding that the unconstitutionality of petitioners' acts could turn on their

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[10] Thus *Johnson* applies to those cases where defendants claimed immunity on the basis of a material fact that is in dispute. *Cantu v. Rocha*, 77 F.3d 795, 803 (5th Cir. 1996). It does not apply in cases where defendants contend that, taking all of plaintiff's factual allegations as true, no violation of clearly established law is shown, or cases where the district court finds undisputed facts that independently could support summary judgment. *Id.*

motives. Assuming *arguendo* that petitioners hated respondent, did not want him to receive a kidney transplant under any circumstances and tried to prevent him from getting such a transplant, their mental state is not actionable as long as respondent was getting adequate medical care by way of dialysis. Consequently, the courts below were wrong to deny qualified immunity based on unsettled questions regarding petitioners' potential animosity towards respondent, because the petitioner's state of mind was immaterial since the objective facts determined by the district court warranted a grant of immunity. Respondent was at all times prior to his transplant operation being given dialysis, the quality of which is not in question. Appendix C at App. 62-65; Appendix F at App. 109-110. The district court held that this treatment was constitutionally acceptable for the period from respondent's incarceration in 1981 up until April 17, 1985, when petitioner McIntosh referred respondent's case to Dr. Levin at the transplant center. However, from April of 1985 until the time of respondent's transplant in February of 1987 (and although respondent continued to receive the same dialysis care), the district court determined that a dislike of plaintiff may have caused petitioners to take action, or not take action, which delayed respondent's kidney transplant. Thus, finding a dispute over personal animosity toward the respondent, the district court concluded it was prevented from making a determination of qualified immunity. The court *assumed* respondent had a right to a kidney transplant, which he did not, as discussed below. The court's position suggests that personal motive can somehow make otherwise objectively reasonable care, unconstitutional.

An allegation, or even the existence, of improper motive cannot transform an action which is objectively reasonable to one that is unconstitutional. In *Acosta v. City and County of San Francisco*, 83 F.3d 1143, 1145 (9th Cir. 1996), which concerned a suspect who was shot and killed by a police officer, the court noted that the reasonableness inquiry is an objective one. "[T]he question is whether the officer's actions are objectively reasonable in light of the facts and circumstances confronting him without regard to his underlying intent or motivation. An officer's 'evil' intentions will not make a constitutional violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional."

Recently the District of Columbia Circuit addressed the issue of intent in the context of a qualified immunity defense where a constitutional right was identified and the unconstitutionality of the official's act turns on his motive. That court determined that "unless the plaintiff offers clear and convincing evidence on the state-of-mind issue at summary judgment and trial, judgment or directed verdict (as appropriate) should be granted for the individual defendant." *Crawford-El v. Britton*, 93 F.3d 813, 815 (D.C.Cir. 1996). The *Crawford-El* case discusses at length the apparent state of confusion in the various circuits regarding subjective motivation and qualified immunity. The decision notes that despite this Court's attempt in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Mitchell v. Forsyth*, 472 U.S. 511 (1985), to "purge qualified immunity doctrine of its subjective components," the various circuits "have understood Harlow to allow inquiry

into subjective motivation where an otherwise constitutional act becomes unconstitutional only when performed with some sort of forbidden motive." *Crawford-El v. Britton*, 93 F.3d 813, 816-817 (D.C.Cir. 1996). In *Crawford-El* the claim was that the defendant's decisions routing plaintiff's property to the institution where plaintiff had been transferred, were driven by a desire to penalize plaintiff's exercise of free speech rights. In the present case respondent claims that petitioners' actions (or lack thereof) relating to seeking a transplant for respondent after April of 1985, were driven by a personal animosity towards respondent. If it were clearly established that plaintiff had a right to such a transplant and petitioners were not providing respondent with alternatively adequate care, petitioners' motive for their action or inaction would be subject to scrutiny. The difficulty is that this claim of unconstitutional motive can easily lead to discovery and trial, resulting in precisely the burden *Harlow* sought to prevent. This is not to say that a state actor's motivation is immaterial in every case alleging a constitutional tort. In cases where a state actor's conduct is not objectively reasonable, or it cannot be determined whether it is reasonable, a further inquiry into state of mind is warranted. Thus the court in *Crawford-El* directs application of a rule that plaintiff cannot defeat a summary judgment motion unless, prior to discovery, he offers specific, non-conclusory assertions of evidence, in affidavits or other materials suitable for summary judgment, from which a fact finder could infer the forbidden motive. 93 F.3d at 819. See also concurring opinion of Justice Kennedy in *Siegert v. Gilley*, 500 U.S. 226, 236 (1991), *reh'g denied*, 501 U.S. 1265 (1991) stating that

"[u]pon the assertion of a qualified immunity defense the plaintiff must put forward specific, nonconclusory factual allegations which establish malice, or face dismissal." The *Crawford-El* court then suggests that the standard of proof must be "clear and convincing evidence" to fulfill Harlow's purpose. 93 F.3d at 821-823.

Unlike the approach taken by the D. C. Circuit in *Crawford-El*, in the wake of *Johnson v. Jones*, ___ U.S. ___, 115 S. Ct. 2151 (1995), and even in light of this Court's elucidation in *Behrens v. Pelletier*, ___ U.S. ___, 116 S. Ct. 834 (1996), the Ninth Circuit now declines jurisdiction when there is a factual dispute. Appendix B. See also, *Pellegrino v. United States*, 73 F.3d 934 (9th Cir. 1996). It makes no matter whether the particular right allegedly violated is clearly established, the action taken by state officials is objectively reasonable, or the disputed fact is immaterial to the plaintiff's claim.

In this case the court assumed that respondent had the right to a kidney transplant, and compounded that error by denying qualified immunity based on potential improper motive in petitioners' actions relating to transplant. If the Ninth Circuit had applied the standard suggested in *Crawford-El* to the facts found by the district court and required respondent to offer clear and convincing evidence as to petitioners' state-of-mind, it would have granted qualified immunity notwithstanding the assumption that respondent had a right to a transplant.

The district court granted these petitioners qualified immunity when it held that treatment of respondent's

renal failure with dialysis, rather than a kidney transplant, from 1981 to April 1985, could not constitute deliberate indifference. Appendix C at App. 35-42; 62-65. The district court did not find that the quality of respondent's dialysis changed in any way after April of 1985. In fact, respondent's counsel admitted that respondent did not claim that the medical care he received was inappropriate. Appendix F at App. 109-110. If petitioners were not deliberately indifferent prior to April of 1985, and continued to provide the same dialysis treatment to respondent after that date, it makes no sense that the act of inquiring about a transplant for respondent in April of 1985, transformed respondent's care to something that was now potentially unconstitutional.

The petitioners did not violate "clearly established law," because at all times respondent was provided with adequate medical care by way of dialysis and related treatment for his condition. There is no presently existing cause of action for a physician's failure to recommend a patient for a kidney transplant.[11] Persons on public

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[11] No such cause of action has been recognized. See *Developments in the Law – Medical Technology and the Law, Organ Transplantation*, 103 Harv. L. Rev. 1614 (1990). The Harvard Law Review article proposes that the states *create* a cause of action, a form of malpractice, for a physician's failure to place a qualified patient on a transplant waiting list.

> As in any malpractice case, the physician would be held to a standard of 'good medical practice' and the jury would determine whether the physician's decision to exclude the patient from the waiting list fell short of this standard. . . . This solution has three shortcomings. It might prove extremely difficult for the courts to define precisely a standard of good

assistance do not have a constitutional right to receive an organ transplant to remedy a serious medical condition.[12]

> medical practice for recipient selection. [Second point related to the expense of judicial relief] . . . Finally, as in many malpractice cases, it would be difficult for a patient to prove that his physician's judgment fell short of good medical practice because the physician would have far better access to the information that formed the basis of the decision. Although the first two obstacles are somewhat intractable, the last could be overcome by shifting the burden of proof from the patient to the physician. Once the patient had presented a prima facia case, which would include proof of the patient's medical need and his ability to comply with the post-transplantation regimen, the physician would be required to show that his decision to exclude the patient from the waiting lists constituted good medical practice.

Id. at 1641.

The above proposal not only highlights the fact that *there is no presently existing cause of action* for failure to recommend a patient for a transplant, but, assuming *arguendo* there were such a cause of action, suggests that the burden would first rest with the plaintiff to present a prima facia case of his ability to comply with the post-transplantation regime. The record in the district court below, in this case, exemplifies the need for the plaintiff to present such a prima facia case. It was the district court's confusion over the state of respondent's noncompliance, and who knew what, when, and to whom it was communicated, that led the court to conclude that there were factual disputes as to whether petitioners took all possible action to facilitate a transplant after initial referral in April of 1985, and whether personal animosity was a factor. Appendix C at App. 42-58.

[12] Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 et seq., known as the "Medicaid Statute," provides for federal grants to enable states to provide medical care to persons whose income and resources are insufficient to meet the costs of

Furthermore, the Federal Bureau of Prisons does not provide kidney transplants to federal prison inmates. Appendix F at App. 105. The fact of incarceration by the State of California should not place on state officials a greater obligation to provide an organ transplant than the obligation imposed on physicians treating the general population or federal prisoners within the same state. Petitioners have discovered no statutory or case law requiring that a person with a failed organ must be referred for transplant in lieu of alternative treatment, in order to be receiving adequate medical care. Neither has respondent cited such law.

Even if petitioners felt a personal animosity toward respondent and acted upon such animosity in failing to vigorously pursue his referral for transplant evaluation after April of 1985 (although it is unclear what conduct would have been required), such assumption does not preclude qualified immunity since there is no such thing as a cause of action for failure to recommend a patient for kidney transplant.

Petitioners are entitled to qualified immunity if the law they are alleged to have violated was clearly established at the time of the action in question, and their conduct meets the "objective legal reasonableness" test.

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necessary medical services. *See, Meusberger v. Palmer*, 900 F.2d 1280 (8th Cir. 1990). In granting money for medical purposes, Congress did not mandate that the funding be used for organ transplants. Under the 1987 Congressional amendments to the Act, the states were given discretion whether to cover organ transplants. *Dexter v. Kirschner*, 984 F.2d 979 (9th Cir. 1993); *Ellis v. Patterson*, 859 F.2d 52 (8th Cir. 1988).

Harlow v. Fitzgerald, 457 U.S. 800, 818-819 (1981). Consequently, the question for the court was whether the care provided was objectively reasonable or was the care such that petitioners must have known their conduct was unlawful at the time they were providing care to respondent. Could a reasonable nephrologist providing dialysis and related medical care to an end stage renal disease patient have thought he was acting in accordance with the constitutional provision against cruel and unusual punishment? The doctrine of qualified immunity provides "ample room for mistaken judgments" because it protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs* 475 U.S. 335, 343 (1986); quoted in *Hunter v. Bryant*, 502 U.S. 224 (1991).

The Ninth Circuit's application of *Johnson v. Jones*, ___ U.S. ___, even in light of *Behrens v. Pelletier*, ___ U.S. ___, is a stark departure from the principles established by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1981). Qualified immunity is no longer an objective assessment of a state actor's conduct, but instead turns on whether a plaintiff can make a claim that action taken by state officials was taken for a wrong reason, no matter how objectively reasonable. This Court has characterized *Harlow*, as having "purged qualified immunity doctrine of its subjective components." *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985); see also *Davis v. Scherer*, 468 U.S. 183, 191 (1984). However, as the court in *Crawford-El v. Britton*, 93 F.3d 813, 817 (D.C. Cir. 1996), observed "under the decisions of every circuit court addressing the matter, *Harlow* has not accomplished the stated purpose."

This case presents this Court with the opportunity to settle what is meant by objective legal reasonableness,

when the intent of a state actor is immaterial to consideration of qualified immunity, and when a dispute of fact does not deprive a court of the jurisdiction to consider a qualified immunity claim.

CONCLUSION

The undisputed facts reflect that the medical treatment respondent received was within the standard of care from an objective standpoint regardless of any disputed personal animosity toward him. Under these facts, petitioners contend there was no violation of clearly established law, and petitioners were entitled to qualified immunity. Allegations of improper motive did not create issues of disputed material fact that could prevent a grant of qualified immunity at the summary judgment stage in this case. The Ninth Circuit erred in finding that it did not have jurisdiction to review the district court's order denying qualified immunity.

The uncertainty evident from Circuit Court decisions on qualified immunity following *Johnson v. Jones* and *Behrens v. Pelletier* can be settled by this case. The troubling question of state actor motivation can be resolved, and the doctrine of qualified immunity can be restored to its stated purpose of shielding state actors from lawsuits who act reasonably in the discharge of their duties.

For all of the above stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney General of the
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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAYMOND D. JACKSON, *Plaintiff-Appellee,* v. DUNCAN A. MCINTOSH; DAVID VICTORINO, Defendants-Appellants.	No. 94-16741 D.C. No. CV 90-0760-EJG OPINION

Appeal from the United States District Court
for the Eastern District of California
Edward J. Garcia, District Judge, Presiding

Argued and Submitted
August 17, 1995 – San Francisco, California

Filed April 11, 1996

Before: Alex Kozinski and John T. Noonan, Jr.,
Circuit Judges, Rudi M. Brewster,
*District Judge.

Opinion by Judge Noonan

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* The Honorable Rudi M. Brewster, United States District Judge for the Southern District of California, sitting by designation.

SUMMARY

Individual Rights/Civil Rights/Government Law

The court of appeals dismissed an appeal. The court held that it lacked jurisdiction over an appeal from the denial of doctors' motion for summary judgment in a civil rights action on grounds of qualified immunity, where a state prisoner on dialysis alleged that the doctors chose to deny him the opportunity for a kidney transplant on account of personal animosity.

Appellee Raymond Jackson, a state prisoner on dialysis, brought a federal civil rights action against appellants Dr. Duncan McIntosh and Dr. David Victorino, claiming that the doctors violated his Eighth Amendment rights by refusing him a kidney transplant. The doctors moved for summary judgment on the ground of qualified immunity. The district court denied the motion, and the doctors appealed interlocutorily.

[1] In contending that there was no clearly established law requiring them to provide a kidney transplant to a prisoner on dialysis, the doctors stated the issue too narrowly. [2] Jackson alleged that the doctors chose to deny him the opportunity for a transplant not because of an honest medical judgment, but on account of personal animosity. If Jackson proves that claim at trial, he will have shown that the doctors were deliberately indifferent to his serious medical needs. [3] Dismissal of the appeal for lack of jurisdiction was warranted.

COUNSEL

Kathleen E. Gnekow, William V. Cashdollar, Deputy Attorney Generals, Sacramento, California, for the defendants-appellants.

Amitai Schwartz, Antonio Ponvert, III, San Francisco, California, for the plaintiff-appellee.

OPINION

NOONAN, Circuit Judge:

Raymond D. Jackson, a state prisoner on dialysis, brought suit under 42 U.S.C. § 1983 contending that Dr. Duncan McIntosh and Dr. David Victorino had violated his rights under the Eighth Amendment by refusing him a kidney transplant. The doctors moved for summary judgment on the ground of qualified immunity. The district court denied the motion. The doctors appeal.

ANALYSIS

[1] The doctors contend that they are entitled to qualified immunity because there was no clearly established law requiring them to provide a kidney transplant to a prisoner on dialysis. The doctors state the issue too narrowly. "The right the official is alleged to have violated must be made specific in regard to the kind of action complained of for the constitutional right at issue to have been clearly established." *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 70 F.3d 1095, 1100-01 (9th Cir.1995). It is settled law that deliberate indifference to serious medical needs of prisoners violates the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

"Prison officials are indifferent to prisoners' serious medical needs when they deny, delay, or intentionally interfere with medical treatment." *Hamilton v. Endell*, 981 F.2d 1062, 1066 (9th Cir.1992). For a right to be clearly established it is not necessary that the very action in question have previously been held unlawful. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). To define the law in question too narrowly would be to allow defendants "to define away all potential claims." *Kelley v. Borg*, 60 F.3d 664, 667 (9th Cir.1995).

Certain principles follow necessarily from the deliberate indifference standard and facilitate its application to cases such as this one, which involves choices between alternative courses of treatment. We held in *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir.1989) (citing *Estelle*, 429 U.S. at 107), for example, that a plaintiff's showing of nothing more than "a difference of medical opinion" as to the need to pursue one course of treatment over another was insufficient, as a matter of law, to establish deliberate indifference. In other words, where a defendant has based his actions on a medical judgment that either of two alternative courses of treatment would be medically acceptable under the circumstances, plaintiff has failed to show deliberate indifference, as a matter of law. *See Estelle*, 429 U.S. at 107-08. To prevail under these principles, Jackson must show that the course of treatment the doctors chose was medically unacceptable under the circumstances, *Williams v. Vincent*, 508 F.2d 541, 543-44 (2d Cir.1974) (cited with approval in *Estelle*, 429 U.S. at 104 n.10), and the plaintiff must show that they chose this course in conscious disregard of an excessive risk to plaintiff's health. *Farmer v. Brennan*, 114 S.Ct. 1970, 1978-79 (1994).

[2] The doctors may well find solace in these principles when they are applied by the trier of fact, or on appeal from a final judgment. They are of no avail to the doctors on this interlocutory appeal, however, as Jackson has alleged the doctors chose to deny him the opportunity for a kidney transplant, not because of an honest medical judgment, but on account of personal animosity. If Jackson proves that claim at trial, he will have shown that the doctors were deliberately indifferent to his serious medical needs.

The doctors further argue that Jackson failed to show a genuine issue of material fact as to whether they were deliberately indifferent, in fact, to his medical needs. As to that question we lack jurisdiction. It is a question that cannot be separated from the merits of Jackson's case. It is a question reviewable after trial. We are instructed by the Supreme Court that for these reasons appellate jurisdiction is lacking. *Johnson v. Jones*, 115 S.Ct. 2151, 2156 (1995). *Johnson* dictates that we must refrain from considering this question, a departure from our prior approach to qualified immunity appeals from a denial of summary judgment. *See, e.g., Burgess v. Pierce*, 918 F.2d 104, 106 n.3 (9th Cir.1990). Given the district court's determination that there is a triable issue as to deliberate indifference, the doctors were not entitled to summary judgment on the ground that they could reasonably have believed their conduct did not violate clearly-established law. *Hamilton v. Endell*, 981 F.2d 1062, 1066 (9th Cir. 1992).

[3] Accordingly, the appeal is *DISMISSED* for lack of jurisdiction.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAYMOND D. JACKSON, *PLAINTIFF-APPELLEE,* v. DUNCAN A. MCINTOSH; DAVID VICTORINO, *Defendants-Appellants.*	No. 94-16741 D.C. No. CV 90-00760-EJG ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of California
Edward J. Garcia, District Judge, Presiding

Argued and Submitted
August 17, 1995 – San Francisco, California

Filed April 11, 1996
Amended July 18, 1996

Before: Alex Kozinski and John T. Noonan, Jr.,
Circuit Judges, Rudi M. Brewster,* District Judge.

Opinion by Judge Noonan

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* The Honorable Rudi M. Brewster, United States District Judge for the Southern District of California, sitting by designation.

SUMMARY

Individual Rights/Civil Rights/Government Law

The court of appeals dismissed an appeal. The court held that it lacked jurisdiction over an appeal from the denial of doctors' motion for summary judgment in a civil rights action on grounds of qualified immunity, where a state prisoner on dialysis alleged that the doctors chose to deny him the opportunity for a kidney transplant on account of personal animosity.

Appellee Raymond Jackson, a state prisoner on dialysis, brought a federal civil rights action against appellants Dr. Duncan McIntosh and Dr. David Victorino, claiming that the doctors violated his Eighth Amendment rights by refusing him a kidney transplant. The doctors moved for summary judgment on the ground of qualified immunity. The district court denied the motion, and the doctors appealed interlocutorily.

[1] In contending that there was no clearly established law requiring them to provide a kidney transplant to a prisoner on dialysis, the doctors stated the issue too narrowly. [2] Jackson alleged that the doctors chose to deny him the opportunity for a transplant not because of an honest medical judgment, but on account of personal animosity. If Jackson proves that claim at trial and he has shown that the delay in performing the transplant was medically unacceptable, he will have shown that the doctors were deliberately indifferent to his serious medical needs. [3] Dismissal of the appeal for lack of jurisdiction was warranted.

COUNSEL

Kathleen E. Gnekow, William V. Cashdollar, Deputy Attorney Generals, Sacramento, California, for the defendants-appellants.

Amitai Schwartz, Antonio Ponvert, III, San Francisco, California, for the plaintiff-appellee.

ORDER

The opinion filed on April 11, 1996 is amended as follows:

At slip op. page 4552 at line 7 of the first full paragraph, the sentençe beginning "If Jackson . . . " and ending "medical needs." is hereby amended to read "If Jackson proves that claim at trial, and he has shown that the delay in performing the kidney transplant was medically unacceptable, he will have shown that the doctors were deliberately indifferent to his serious medical needs."

With this amendment, the panel as constituted in the above case has voted to deny the petition for rehearing. Judges Kozinski and Noonan have voted to reject the suggestion for rehearing en banc and Judge Brewster so recommends.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R.App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

OPINION

NOONAN, Circuit Judge:

Raymond D. Jackson, a state prisoner on dialysis, brought suit under 42 U.S.C. § 1983 contending that Dr. Duncan McIntosh and Dr. David Victorino had violated his rights under the Eighth Amendment by refusing him a kidney transplant. The doctors moved for summary judgment on the ground of qualified immunity. The district court denied the motion. The doctors appeal.

ANALYSIS

[1] The doctors contend that they are entitled to qualified immunity because there was no clearly established law requiring them to provide a kidney transplant to a prisoner on dialysis. The doctors state the issue too narrowly. "The right the official is alleged to have violated must be made specific in regard to the kind of action complained of for the constitutional right at issue to have been clearly established." *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 70 F.3d 1095, 1100-01 (9th Cir.1995). It is settled law that deliberate indifference to serious medical needs of prisoners violates the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). "Prison officials are indifferent to prisoners' serious medical needs when they deny, delay, or intentionally interfere with medical treatment." *Hamilton v. Endell*, 981 F.2d

1062, 1066 (9th Cir.1992). For a right to be clearly established it is not necessary that the very action in question have previously been held unlawful. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). To define the law in question too narrowly would be to allow defendants "to define away all potential claims." *Kelley v. Borg*, 60 F.3d 664, 667 (9th Cir.1995).

Certain principles follow necessarily from the deliberate indifference standard and facilitate its application to cases such as this one which involves choices between alternative courses of treatment. We held in *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir.1989) (citing *Estelle*, 429 U.S. at 107), for example, that a plaintiff's showing of nothing more than "a difference of medical opinion" as to the need to pursue one course of treatment over another was insufficient, as a matter of law, to establish deliberate indifference. In other words, where a defendant has based his actions on a medical judgment that either of two alternative courses of treatment would be medically acceptable under the circumstances, plaintiff has failed to show deliberate indifference, as a matter of law. *See Estelle*, 429 U.S. at 107-08. To prevail under these principles, Jackson must show that the course of treatment the doctors chose was medically unacceptable under the circumstances, *Williams v. Vincent*, 508 F.2d 541, 543-44 (2d Cir.1974) (cited with approval in *Estelle*, 429 U.S. at 104 n. 10), and the plaintiff must show that they chose this course in conscious disregard of an excessive risk to plaintiff's health, *Farmer v. Brennan*, 114 S.Ct. 1970, 1978-79 (1994).

[2] The doctors may well find solace in these principles when they are applied by the trier of fact, or on

appeal from a final judgment. They are of no avail to the doctors on this interlocutory appeal, however, as Jackson has alleged the doctors chose to deny him the opportunity for a kidney transplant, not because of an honest medical judgment, but on account of personal animosity. If Jackson proves that claim at trial, and he has shown that the delay in performing the kidney transplant was medically unacceptable, he will have shown that the doctors were deliberately indifferent to his serious medical needs.

The doctors further argue that Jackson failed to show a genuine issue of material fact as to whether they were deliberately indifferent, in fact, to his medical needs. As to that question we lack jurisdiction. It is a question that cannot be separated from the merits of Jackson's case. It is a question reviewable after trial. We are instructed by the Supreme Court that for these reasons appellate jurisdiction is lacking. *Johnson v. Jones*, 115 S.Ct. 2151, 2156, 132 L.Ed.2d 238 (1995). *Johnson* dictates that we must refrain from considering this question, a departure from our prior approach to qualified immunity appeals from a denial of summary judgment. *See, e.g., Burgess v. Price*, 918 F.2d 104, 106 n. 3 (9th Cir.1990). Given the district court's determination that there is a triable issue as to deliberate indifference, the doctors were not entitled to summary judgment on the ground that they could reasonably have believed their conduct did not violate clearly-established law. *Hamilton v. Endell*, 981 F.2d 1062, 1066 (9th Cir.1992).

[3] Accordingly, the appeal is *DISMISSED* for lack of jurisdiction.

APPENDIX C

United States District Court
for the
Eastern District of California
July 25, 1994

** CERTIFICATE OF SERVICE **

2:90-cv-00760

Jackson

v.

McIntosh

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on July 25, 1994, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Amitai Schwartz
Law Offices of Amitai Schwartz
155 Montgomery Street
Suite 800
San Francisco, CA 94104

CL/EJG

VC/GGH

DAG

Jack L. Wagner, Clerk

BY: /s/ V Carizales
V Carrizales,
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RAYMOND D. JACKSON, SR., Plaintiff,

vs.

DUNCAN McINTOSH, et al., Defendants.

No. CIV S-90-0760 EJG GGH

/

RAYMOND D. JACKSON, SR., Plaintiff,

vs.

EDDIE YLST, et al., Defendants.

No. CIV S-91-1624 EJG GGH

FINDINGS AND RECOMMENDATIONS

(Filed Jul. 25, 1994)

/

INTRODUCTION AND SUMMARY

Previously pending on this court's law and motion calendar for June 2, 1994, was defendants' motion for summary judgment. Plaintiff is a state prisoner proceeding with two consolidated civil rights actions.

Plaintiff has filed two related civil rights actions in this matter, Civ. S-90-760, and Civ. S-91-1624, consolidated by order of this court filed October 13, 1993. In both actions plaintiff contends, *inter alia*, that defendants were deliberately indifferent to plaintiff's serious medical needs, thereby inflicting cruel and unusual punishment in violation of the Eighth Amendment. Plaintiff alleges that defendants have denied him adequate medical care,

and wrongfully denied his repeated requests for a kidney transplant. As a result, plaintiff contends that he endured prolonged pain, physical trauma, permanent disfigurement, and significant mental suffering. Plaintiff's post-transplant status has generated additional issues pertaining to treatment, medication, diet, and housing. Defendants have opposed plaintiff's claims on a variety of grounds, but principally on their overall contention that plaintiff was a noncompliant patient whose noncompliance served as a medically accepted basis for delaying his transplant.

Defendants assert six matters on which they contend they are entitled to summary judgment. Their assertions are, in the order presented, that: (1) plaintiff received constitutionally adequate medical care; (2) plaintiff has failed to prove that defendants conspired to deprive him of any constitutional rights; (3) plaintiff's claim for injunctive relief relative to obtaining a medically necessary diet is moot; (4) plaintiff has not stated a cause of action against the administrative and/or supervisory defendants under any theory of law, including the doctrine of respondeat superior; (5) plaintiff is barred by res judicata from pursuing the question whether he was entitled to a kidney transplant prior to 1987, as it was adjudicated by the Solano County Superior Court in 1986; and (6) defendants are entitled to qualified immunity. These issues are addressed seriatim, except for the fourth issue which is not necessary to discuss.

This is defendants' third attempt at a dispositive motion. Normally, the court would view the bringing of piecemeal or repetitive dispositive motions as an abuse of the litigation process. However, the situation is different

here. Firstly, the court invited inquiry about whether California officials may have been justified in delaying a kidney transplant operation for plaintiff on account of state policies which legitimately discouraged transplant surgeries. Also, plaintiff is now represented by competent counsel, and defendants' motions, as well as plaintiff's opposition, demonstrate that the issues in this case have been much more fully developed than they were in the previous motions. To the extent that the findings herein conflict with previous findings, these findings represent the better informed conclusions of this court. Finally, the recent case of *Farmer v. Brennan*, 114 S.Ct. 1970 (1994), requires a reexamination of the issues in this case due to its clarification of the term "deliberate indifference."

Moreover, it is important to emphasize here what this case is not about. It is not about the quality of plaintiff's dialysis treatment *per se*. Plaintiff's complaint concerns the fact that he was compelled to undergo painful and potentially debilitating dialysis in lieu of a transplant which would have mitigated plaintiff's long-term outlook or obviated plaintiff's suffering. However, no meaningful attempt (expert testimony) is made by plaintiff to establish that the dialysis treatment itself fell below Eighth Amendment standards.[1]

Accordingly, the court will recommend summary judgment in all respects on the merits and in favor of all

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[1] Plaintiff's allegations of pain in dialysis, or complications therefrom, are by no means irrelevant. However, viewed in their proper context, plaintiff's allegations stand as a basis for his claim that the delay in transplant, which necessitated such pain and complications, violated the Eighth Amendment.

defendants except for that period of time between Dr. McIntosh's initial recommendation to PMC that plaintiff could be transplanted with a kidney from a live donor to the time plaintiff actually received a transplant some years later. The time period, April 17, 1985, to February 5, 1987, involves defendants McIntosh and Victorino. All of defendants, differing theories of non-liability fail for that period of time.

BACKGROUND

The factual background of these actions was largely set forth in this court's Findings and Recommendations filed September 11, 1992. As stated therein, plaintiff commenced dialysis in 1979, for treatment of chronic renal failure. His dialysis was continued by the California Medical Facility (CMF) in Vacaville, upon his reception there in 1981.

According to plaintiff, upon his arrival at CMF plaintiff told defendant Dr. Duncan McIntosh, the nephrologistcharge of CMF's dialysis unit, that his mother, brother and sister were willing to donate one of their kidneys to plaintiff. Jackson Depo., at 44. Plaintiff's siblings wrote letters to Dr. McIntosh in December 1984, expressing their willingness to be donors. Exh. D. to Schwartz Decl. In April 1985, Dr. McIntosh wrote a letter to Dr. Barry Levin of San Francisco's Pacific Medical Center, the authorized transplant center for CMF prisoners, in which Dr. McIntosh first suggested that plaintiff be considered for a transplant. A myriad of circumstances, set forth at length below, transpired between April 1985, and February 5, 1987 when PMC performed

the transplant surgery in which plaintiff received a kidney from his brother. As set forth in this court's September 11, 1992, Findings and Recommendations, after unsuccessfully attempting to obtain a kidney transplant through administrative channels, plaintiff turned to the state courts for assistance. Plaintiff filed his first petition for writ of habeas corpus in the Solano County Superior Court on September 9, 1985, which was denied October 1, 1985. Plaintiff's Exhibits 21 and 28 to his Opposition filed January 22, 1992.

On October 17, 1985, plaintiff filed a second petition for writ of habeas corpus, this time with the California Court of Appeal. *Id.*, Exhibit 29. The court ordered the state to respond to plaintiff's petition. *Id.*, Exhibit 30. On November 7, 1985, the state filed a response which included the declaration of CMF's Acting Chief Medical Officer (CMO), Dr. David Victorino. Dr. Victorino stated, *inter alia*, that plaintiff was not considered a viable candidate for a kidney transplant because he was noncompliant and his purported living related donors – brother and sister – were unavailable. *Id.*, Exhibit 32.

On December 19, 1985, the appellate court ordered the Department of Corrections to show cause before the Solano County Superior Court why the Department of Corrections should not reconsider plaintiff's request for a kidney transplant. *Id.*, Exhibit 40A. The court held that the fact that plaintiff's brother was in jail did not necessarily preclude his availability as a donor. On January 24, 1986, the state filed a response and on January 30, 1986, a declaration of defendant Dr. McIntosh. *Id.*, Exhibits 42 and 43. As had Dr. Victorino, Dr. McIntosh stated that plaintiff's siblings had become unavailable and that

plaintiff was not a viable candidate for a transplant because of his non-compliant behavior. *Id.*, Exhibit 43. On January 31, 1986, petitioner filed a traverse. *Id.*, Exhibit 45. On March 19, 1986, the Solano County Superior Court discharged the order to show cause and dismissed the petition for writ of habeas corpus, citing the declaration of defendant McIntosh. *Id.*, Exhibit 47.

On September 2, 1986, plaintiff filed a third petition for writ of habeas corpus, again with the California Court of Appeal. *Id.*, Exhibit 51. On October 7, 1986, the appellate court ordered the Solano County Superior Court to conduct an evidentiary hearing, stating that "a substantial question exists as to whether the decision of the Department of Corrections not to recommend [plaintiff] for a kidney transplant is based on sound medical reasons." *Id.*, Exhibit 53A. On November 12, 1986, plaintiff through his counsel filed a motion to obtain an order for an independent medical evaluation. *Id.*, Exhibit 57. On December 19, 1986, the court considered plaintiff's motion. According to plaintiff's counsel, the deputy attorney general indicated that Dr. McIntosh had agreed to refer plaintiff to PMC for evaluation as a suitable candidate for a kidney transplant operation. *Id.*, Exhibit 62. PMC determined that plaintiff and his brother were a perfect match and agreed to perform the transplant operation. *Id.*, Exhibit 63.

On February 5, 1987, plaintiff received a kidney transplant from his brother. The surgery was performed by the Pacific Medical Center in San Francisco. After the surgery was completed, plaintiff was returned to CMF. Since the transplant, plaintiff has experienced at least

three "rejection" episodes. See Sept. 11, 1992, Findings and Recommendations, at 9, n. 4, and accompanying text.

On April 17, 1990, defendants McIntosh and Thor indicated that plaintiff's condition was stable and he no longer needed to be retained at CMF. Plaintiff's Exhibit 88 to his Opposition filed January 22, 1992. Defendants indicated that plaintiff could be placed in any institution where nephrology consultation was available, recommending that plaintiff's Category "O" status be dropped and that he be referred for alternative placement.

Plaintiff filed his complaint in Civ. S-90-0760 on June 13, 1990, in which he named as defendants physicians Dr. Duncan McIntosh, Director of CMF's Hemodialysis Unit at all relevant times, and Dr. Daniel Thor, then CMF's Chief Medical Officer.

On August 24, 1990, this court recommended denial of plaintiff's motion for a temporary restraining order to prevent the transfer of plaintiff to another correctional facility, which was adopted by the District Judge by order filed October 24, 1990.

This court thereafter, on September 11, 1992, issued Findings and Recommendations, denying in part and granting in part defendants' motion for summary judgment in Civ. S-90-760, which was adopted in full by the District Judge on November 23, 1992. The court therein granted defendants' motion for summary judgment with respect to: (1) the claims against both defendants of retaliatory transfer; (2) the claims against both defendants concerning anti-rejection medication; and denied the motion with respect to (3) the claim against defendant McIntosh concerning deliberate indifference to plaintiff's

serious medical needs prior to receiving the kidney transplant; and (4) the claims against both defendants concerning the low sodium diet and dental-soft diet.

In this court's September 11, 1992, Findings and Recommendations, the court invited further briefing on the scope of the Eighth Amendment to require organ transplants for prison inmates. *Id.*, at 10-11. Defendants thereafter filed a motion for judgment on the pleadings wherein they sought to address this issue. The court determined that it was inappropriate to reach this issue on a motion for judgment on the pleadings, stating that it needed a full factual inquiry, Fed. R. Civ. P. 12(c).[2]

While this issue has been extensively addressed in defendants' current motion,[3] defendants conceded at the

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[2] The court stated (Nov. 10, 1992 Findings and Recommendations, at 3-4):

> The court needs a full factual inquiry, either on undisputed facts at summary judgment or at trial on disputed facts, concerning the subject, including costs of such operations, CDC policies on transplant surgery, practices in other jurisdictions, and the like. The issue of the Eighth Amendment in the context of transplant surgery cannot be decided in a factual vacuum.

[3] Defendants asserted, *inter alia*, that plaintiff was not entitled to a kidney transplant based upon practices in other jurisdictions. For example, organ transplants are not ordinarily provided by the Federal Bureau of Prisons (Defendants' Exhibit 16, excerpts from the U.S. Department of Justice's "Health Services Manual"). Moreover, Congress did not expressly provide for organ transplants in their Medicaid Statute, 42 U.S.C. § 1396 et seq. (Title XIX, Social Security Act), but left this decision to the individual states, some of which have chosen not to cover transplants. Motion, at 39-41, 4344.

hearing that factors of cost and resource allocation were not *actually* material to the California Department of Correction's (CDC) determination herein whether and when plaintiff would receive a kidney transplant. As plaintiff has pointed out, "CMF *does* routinely provide renal transplants and should not . . . be permitted to indiscriminately deny transplants to some patients while providing them to others." Opposition, at 52 (original emphasis). Moreover, since Congress has left the decision to individual states whether to provide transplants under the Medicaid Statute, 42 U.S.C. § 1396 et seq., and California has "made the medical, financial and institutional choice to grant transplants to renal patients at CMF," Opposition, at 53, the issue remains unfair differential treatment within CMF. Plaintiff points out that during the relevant time period, from 1981 to 1987, seven other CMF inmates in the dialysis unit received transplants. *Id.* at 23; McIntosh Depo., at 70-73, 124.

Accordingly, in addressing the issues presented herein, the court views the option of a kidney transplant as it would any other medically approved method of treatment and declines to make any ruling on whether kidney transplants could be constitutionally required.

On November 10, 1992, this court recommended denial of defendants' motion for judgment on the pleadings, which was adopted in full by order of the District Judge filed January 13, 1993.

Meanwhile, on November 26, 1991, plaintiff filed his complaint in Civ. S-91-1624. In addition to expounding upon his Eighth Amendment claims, plaintiff alleges

claims based on conspiracy, 42 U.S.C. § 1985(3), the making of false statements in violation of 18 U.S.C. § 1001, and a denial of equal protection and due process under the Sixth and Fourteenth Amendments,

The fifteen defendants named in plaintiff's Civ. S-91-1624 complaint were Dr. Duncan McIntosh, Dr. Daniel Thor, Dr. David Victorino, Dr. Nick Poulos, and Dr. Carl Bourne; CMF nurses Cathy Lambert, Janet Champion, Nancy Erly, Nancy Friedline, and Jack Downing; CMF Medical Technical Assistants John Goodman, and Bobby Crump; CMF Warden Eddie Ylst; Chief Deputy Warden IvaLee Henry; and CMF inmate Balil Ibn Muhammad.

Defendants Thor, Bourne, Muhammad and Champion have since been dismissed from Civ. S-91-1624. Orders of February 25, 1992, September 3, 1992 and January 4, 1993 (and Findings and Recommendations filed July 7, 1992, and October 29, 1992). In addition, in response to defendants' instant motion for summary judgment, "[p]laintiff concedes that defendants Poulos, Ylst and Henry may be dismissed from these actions." Plaintiff's Memorandum, at 57, n. 39.

There remain eight (8) defendants in Civ. S-91-1624 (McIntosh, Victorino, Crump, Lambert, Downing, Goodman, Erly, Friedline), and two (2) defendants in Civ. S-90-760 (McIntosh and Thor).

DISCUSSION

A. Legal Standard for Summary Judgment

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

Under summary judgment practice, the moving party:

> [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.' " *Id.* Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Id.* at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry

of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.* at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348 (1986). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Rule 56(e); *Matsushita*, 475 U.S. at 586, n. 11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, *Anderson*, 477 U.S. 248-49; *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv. Inc.*, 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.' " *Matsushita*, 475 U.S. at

587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Rule 56(c). The evidence of the opposing party is to be believed, *Anderson*, 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, *Matsushita*, 475 U.S. at 587 (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993 (1962) (per curiam). Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987).

Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita*, 475 U.S. at 587 (citation omitted).

B. Undisputed Facts

Statement of the undisputed facts is not easily performed for this motion. There are obviously many undisputed and disputed evidentiary facts in this medical case; however, the key is to determine whether those undisputed and disputed facts are "material" *in the context of an*

Eighth Amendment deliberate indifference case. For the reasons set forth at length in the legal discussion of Eighth Amendment standards, many disputed facts related herein which might be material if the action were one based on ordinary medical malpractice may well become immaterial considering the higher standard that plaintiff is compelled to meet in this action. That is, a conflict in the medical testimony *per se* is not necessarily material.

The court will relate the key undisputed facts in each specific section. As indicated above, the court will not attempt to relate, much less determine the status of, every disputed fact. If there appears to be a *dispositive* fact that is undisputed, that is, the existence of lesser disputed facts would not change the legal outcome, the court will only discuss that dispositive, undisputed fact.

C. Defendants' Contentions

1. Delay In Referring Plaintiff For Transplant Surgery

As indicated above, *the* overriding issue here is whether defendants' delay in referring plaintiff for transplant surgery violated the Eighth Amendment. Defendants assert: (1) that plaintiff did not suffer from a "serious" medical condition once hemodialysis was offered him; and (2) assuming the court finds a serious medical condition, defendants did not treat plaintiff with deliberate indifference.

In order to state a § 1983 claim for violation of the Eighth Amendment based on inadequate medical care,

plaintiff must allege "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285 (1976). To prevail, plaintiff must show both that his medical needs were (1) *objectively serious*, and (2) that defendants possessed *a sufficiently culpable state of mind. Wilson v. Seiter*, 501 U.S. 294, 111 S.Ct. 2321 (1991); *McKinney v. Anderson*, 959 F.2d 853 (9th Cir. 1992)(on remand).

a. "Serious" Medical Need

"Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are 'serious.' " *Hudson v. McMillan*, ___ U.S. at ___, 112 S. Ct. 998, 3000 (1992). "A 'serious' medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.' *Gamble*, 429 U.S. at 104, 97 S.Ct. at 291. . . . The existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain 'serious' need are examples of indications that a prisoner has for medical treatment. *See*, e.g., *Wood v. Housewright*, 900 F. 2d 1332, 1337-41 (9th Cir. 1990) (citing cases); *Hunt v. Dental Dept.*, 865 F. 2d 198, 200-01 (9th Cir. 1989)." *McGuckin v. Smith*, 974 F. 2d, 1059-60 (9th Cir. 1992).

Defendants contend that the court need not reach the question of deliberate indifference because plaintiff's

medical condition while on dialysis cannot be considered constitutionally "serious." While defendants acknowledge this court's prior finding that "it is undisputed that plaintiff's medical needs were objectively serious," Sept. 11, 1992 Findings and Recommendations, at 16, they assert that "the question is not so easily discarded," and "that the Court was too hasty in [so] concluding." Motion, at 37.

"[D]efendants concede that plaintiff suffered from a serous [sic] medical condition such that his kidneys failed him," Motion, at 37, but argue that since dialysis is a medically approved method of treatment for kidney failure, once plaintiff received dialysis he "no longer suffered a serious medical condition mandating additional treatment." Motion, at 41. Defendants further argue that plaintiff's assertions of pain, suffering, and complications while on dialysis, do not elevate his "dialysized" state to a serious medical condition because these symptoms are common to other dialysis patients.

Defendants cite no cases that evaluate the seriousness of a prisoner's medical need based on a treated, rather than untreated, medical condition. They assert, however, that for this court to conclude otherwise "would be making the unprecedented judicial determination that dialysis is an inadequate method of treatment for renal failure." *Id.*, at 37, citing, *inter alia*, *U.S. v. DeCologero*, 821 F. 2d 39, 43 (1st Cir. 1987) [the government need only provide "services at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards"]; and *Sanchez v. Vild*, 891 F. 2d 240 (9th Cir. 1989) ["a difference of opinion

does not amount to a deliberate indifference to [a] serious medical need"].

Defendants' analysis not only prematurely leaps into determinations of deliberate indifference, rather than serious medical need, but is itself superficial. As the Supreme Court has recognized, even a facially acceptable method of treatment may give rise to a claim of deliberate indifference if that treatment is so inappropriate a response as to come outside the scope of disagreement among medical professionals. *Estelle v. Gamble*, 429 U.S. at 104, n. 10 and accompanying text. The Supreme Court cites the illustrative example of *Williams v. Vincent*, 508 F. 2d 541 (2nd Cir. 1974), wherein the court concluded that doctors, "choosing the 'easier and less efficacious treatment' of throwing away the prisoner's ear and stitching the stump may be attributable to 'deliberate indifference . . . rather than an exercise of professional judgment.' " *Estelle*, 429 U.S. at 104, n. 10. Under defendants' theory, sutures render any gaping wound nonserious. The court supposes that cauterization by fire of the gaping wound would qualify as treatment since it is effective in stopping the bleeding. However, no one associated with this case would be so bold as to suggest that this painful and potentially dangerous treatment, in light of the myriad less painful, effective treatments to stop bleeding, would be immune from review under the Eighth Amendment.[4]

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[4] Defendants, theory would be less than universally applicable even in a situation where prison medical officials ultimately caused a cure of plaintiff's underlying serious medical condition. For example, consider the example where plaintiff has a broken bone which necessitates surgery. A physician with no appropriate training in orthopedic surgery

A similar, but perhaps less egregious, example would be the totally incompetent and injurious administration of insulin to a diabetic which, under defendant's theory, would render the underlying diabetes a non-serious medical condition the official response to which would be insulated from further judicial review.

Defendants' theory is also directly at odds with Ninth Circuit authority which clearly holds that incompetent treatment in itself may violate the Eighth Amendment. *Ortiz v. City of Imperial*, 884 F.2d 1312, 1314 (9th Cir. 1989). If defendants' theory were correct, Ortiz could never have litigated his treatment because the treatment *per se* rendered his medical condition "non-serious." If defendants' theory is that only competent medical treatment renders an objectively serious condition "non-serious," defendants' theory then begs the issue of whether certain treatment was deliberately indifferent or not. Nothing would be gained by defendants' theory in this context since resolution of the primary issue of deliberate indifference would render moot the decision on whether plaintiff's condition was serious or not.

For these reasons, a court's consideration of treatment choice necessarily represents the final, rather than

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nevertheless attempts the operation out of professional curiosity and botches it with resultant significant pain to plaintiff. Even if the botched surgery is later able to be rectified with no significant permanent injury, defendants would be hard pressed to argue that plaintiff had no case under the Eighth Amendment on the theory that plaintiff did not have a serious medical condition.

the first, step in the determination of deliberate indifference. Applying established criteria, the court concludes that plaintiff's untreated end-stage renal disease, or kidney failure, constituted a serious medical need. Any reasonable doctor would have found this condition important to treat, for failure to treat this condition would result in death. *McGuckin*, 974 F. 2d at 1059-60. Having concluded that plaintiff's untreated medical condition constituted a serious medical need, the court now proceeds to the more difficult deliberate indifference issue.

b. Deliberate Indifference

The recent case of *Farmer v. Brennan*, 114 S.Ct. 1970 (1994), has greatly clarified the standard of deliberate indifference in a manner that defines a very strict standard that a plaintiff must meet in order to meet the deliberate indifference standard. Of course, negligence is insufficient. *Id.* at 1978. However, even civil recklessness (failure to act in the face of an unjustifiably high risk of harm which is so obvious that it should be known) is insufficient. *Id.* at 1979. It is nothing less than recklessness in the criminal sense – a subjective standard – disregard of a risk of harm of which the actor is *actually* aware. *Id.* at 1979-1981. "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* If a medical risk is concededly obvious, the trier of fact may draw an inference of actual knowledge of the risk of harm, but obviousness *per se* will not impart knowledge as a matter of law. Also significant

to the analysis here are the well established principles that mere differences of opinion concerning the appropriate treatment cannot be the basis of an Eighth Amendment violation, *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981), and that mere delay in medical treatment, without any harm resulting therefrom, is not actionable.

Superimposed on these Eighth Amendment standards is the fact that in cases involving complex medical issues, such as the obviousness of risk from delayed transplant, or whether the failure to recommend a transplant was so deficient so as to amount to criminal recklessness, expert opinion will almost always be necessary to establish the necessary level of deliberate indifference. *Hutchinson v. United States*, 838 F.2d 390 (9th Cir. 1988). Thus, although there may be subsidiary issues of fact in dispute, e.g., the precise time that a donor transplant was available, unless plaintiff's expert can give unequivocal testimony (assuming subsidiary facts in her client's favor) that the failure to recommend a transplant constituted an obvious risk of harm, either of long-term injury or needless suffering, which any trained practitioner would actually have recognized (thereby creating a *material* issue of fact), summary judgment should be entered for defendants. The dispositive question on this summary judgment motion is ultimately not what was the most appropriate course of treatment for plaintiff, but whether the failure to timely give a certain type of treatment was, in essence, criminally reckless.

Applying this analysis to the present case the court initially notes that there is no bona fide dispute that plaintiff's kidney condition was serious and that, assuming no contraindications, transplant surgery in lieu of

permanent dialysis was clearly the treatment of choice. Certainly issues of fact have been raised that long-term dialysis can be painful, create other complications, and ultimately unsuccessful in averting death on account of kidney failure. To go forward with the analysis therefore, the court will assume these major facts in favor of the non-moving party, and determine whether issues of fact exist to show that defendants were deliberately indifferent in not timely recommending a transplant. Plaintiff contends that there were no significant contraindications that precluded early transplant surgery; defendants urge that plaintiff's non-compliant attitude medically speaking rendered transplant surgery inadvisable. Has plaintiff set forth evidence that defendants' excuse was so palpably deficient that a trier of fact could infer actual knowledge on the part of defendants that their failure to recommend, and follow through on their recommendation for transplant surgery, up until the time plaintiff actually received the transplant, would cause plaintiff unnecessary injury or unnecessary, significant pain? The court has divided the analysis into two phases: (1) up to April 1985, and (2) from April 1985, to February 1987.

(i) Delay in Obtaining Transplant Up to April 1985

Plaintiff contends that defendants' reliance on non-compliance as the basis for delaying plaintiff's transplant lacks credibility and is clearly in dispute because "throughout this litigation, the defendants have asserted numerous and conflicting justifications for why the transplant was not earlier performed." Opposition, at 24, 25-30.

For the reasons stated below, the court is persuaded that the resolution of defendants' motion is different with respect to the periods of time before and after Dr. McIntosh's April 17, 1985 letter to PMC's Dr. Barry Levin, in which Dr. McIntosh first suggests that plaintiff be considered for a kidney transplant. While Dr. McIntosh testified at one point that he was unsure why he wrote Dr. Levin at the time he did,[5] and there is some question whether this letter was intended to be, or was in fact considered to be, a formal "referral" of plaintiff for transplant consideration, it demarcates a change in defendants' attitude and position. Several factors apparently contributed to Dr. McIntosh's decision to write the letter, including, as set forth in more detail below, the clear availability of plaintiff's siblings as potential donors, the desire to get plaintiff "off the backs" of the dialysis unit staff, and, most significantly, an increase in the degree of plaintiff's compliance.

Defendants contend through their expert declarations and depositions that the primary reason for non-referral from the time plaintiff first requested a transplant (about 1981) to 1985 was his inability to comply with a medical regimen. Defendants contend that to transplant a

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[5] As set forth in the McIntosh Deposition, at 183:

Q: How did you decide to write this letter at this time on April 17, 1985?

A: I don't know. I don't know why I chose that time.

Q: Why didn't you write a letter to PMC about Jackson as soon as you heard that his brother and sister were willing to donate a kidney?

A: I don't know. I don't have an explanation for that.

patient who exhibits noncompliance prior to the operation might well result in a wasted operation in that compliance with medical direction after a transplant operation is critical to the long-term success of the operation. In order to create an inferential issue of fact *in the deliberate indifference context*, plaintiff's expert would have to strongly state that no reasonable medical professional would hold such an opinion; that to do so was unthinkable. The resolution of the conflict would then have to await trial. However, plaintiff's expert did not state such an opinion.

As a general matter, Dr. Graber testified that patient noncompliance was commonly recognized as a significant medical consideration in determining whether a dialysis patient should be considered for, and/or provided with, a kidney transplant. All of defendants' experts agree with this premise, and with Dr. Graber's further opinion that patient noncompliance may provide a legitimate medical basis for denying a cadaver transplant, which represents a limited donor pool. Dr. Graber testified that plaintiff's noncompliance was so serious that she "would *never* have referred Mr. Jackson for a cadaver transplant." (Graber Depo., at 112, emphasis added). Basing her opinions on what she believed to be plaintiff's "entire medical record," *id.*, at 115, 116, plaintiff testified that while plaintiff's noncompliance was "not the very worst that I've seen," it was nonetheless "moderately severe" (*id.*, at 114)

and "extremely well documented" (*id.*, at 113).[6] Dr. Graber's conclusions were consistent with those of

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[6] The following is taken from Dr. Graber's May 1994 deposition, at 112-114:

Q: Would you have referred him [Jackson] in 1981?

A: I would never have referred Mr. Jackson for a cadaver transplant.

. . . Q: You say you never would have referred Mr. Jackson for a cadaver transplant?

A: That's correct, based on my reading of the record.

Q: . . . And why is that?

A: Because he was extremely well documented in the chart as a difficult – not unusually difficult – but he was a difficult dialysis patient who had many behavioral problems which are seen in some dialysis patients and which can be characterized as noncompliance.

. . . Q: What percentage of those patients [Dr. Graber has cared for] were equal or worse than Mr. Jackson in terms of compliance?

A: A tiny proportion.

Q: Is it fair to say that his noncompliance is unusual in this global sphere of patients that you have seen?

A: It is in my personal experience . . . In terms of noncompliance, I would grade his noncompliance as moderately severe. It's certainly not the worst that I've seen. It's difficult, because this is taking place in a prison setting, which is obviously very different in terms of a setting. I would say that it was moderately severe; not the very worst that I've seen.

defendants' experts, including Dr. McIntosh[7] and Dr. Sherman.[8]

However, Dr. Graber was of the view that in cases involving a potential living related donor, the issue of patient noncompliance is a factor to be considered primarily by the potential donor.[9] In Dr. Graber's view,

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[7] Dr. McIntosh stated in his January 22, 1992 Amended Declaration (Exh. H to Schwartz Decl.), at p. 3, para. 10:

> Raymond was uncooperative, disruptive and noncompliant in his treatment. He interfered with dialysis treatment by interfering with the dialysis machines, arriving late for dialysis and refusing to leave once dialysis was completed. He was argumentative with staff during dialysis treatment and has accused staff of trying to kill him. In short, Raymond was abusive, uncooperative, manipulative and a noncompliant patient.

[8] Dr. Sherman treated plaintiff between 1978 and 1981, prior to his admission at CMF. Sherman Depo., at 41. He found plaintiff memorable for his noncompliance (*id.*, at 41):

> Mr. Jackson was one of the first patients that I placed on dialysis in my training . . . He caused me no end of grief in managing; he was an extremely difficult patient to manage, but I accepted that as a challenge and spent a lot of time, as I recollect, in providing him care . . . [I]f Mr. Jackson could write his memoirs well, he could write a textbook on noncompliance in the dialysis patient.

[9] Dr. Graber's Deposition, at 73-74, provides:

> In the case of a recipient for a cadaver kidney . . . there is an issue of whether or not the recipient is likely to be compliant with their post-transplant medication, because . . . there's a great shortage of those kidneys, and you obviously don't want to offer a kidney to someone who is not going to take care of it, because

when there exists such a living related donor, patient noncompliance should not be a factor in the medical determination whether to refer the patient for transplant evaluation or, ultimately, to deny a transplant. Thus, in the present case, it is Dr. Graber's opinion that once a living related donor became available, plaintiff should have been referred to PMC for transplant evaluation.[10]

None of defendants' experts share Dr. Graber's views that a transplant evaluation should be conducted whenever a potential living donor becomes available, regardless of the patient's level of compliance.[11] This issue,

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there are so many other people waiting for a kidney.

I feel . . . in the case of a living related situation, the situation is *slightly* different, the emphasis is *slightly* changed (emphasis added). Compliance is still an issue, but it's the responsibility of the potential donor, assuming that they are fully and completed [sic] educated and informed, to make the decision as to whether or not their relative is likely to be responsible and compliant.

[10] Dr. Graber's Deposition, at 126, 170, provides:

Ideally I would say he [Dr. McIntosh] should have made it [the referral] at the time that the brother came forward and the sister in fact came forward and offered themselves as donors.

I believe that Mr. Jackson should have been given . . . the opportunity to be evaluated for a living related transplant as soon as the donor became available.

[11] Dr. Graber characterized her difference of opinion with Dr. Levin as follows (Graber Depo., at 178):

I believe we have a fundamental ethical difference in that I believe it is the responsibility of the referring or transplant physician to allow the potential donor in a

characterized as "ethical" by Drs. Graber and Levin, therefore represents a matter of professional disagreement

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> living related transplant to make the decision as to whether or not to donate, and Dr. Levin appears from his deposition to believe that it's the responsibility of the physician to make that decision.

As stated by Dr. Levin in his Deposition, at 52-53:

> Q: What you're saying is your criteria for a living donor were no different for [sic] those criteria used for a cadaver, right? A: Right. A noncompliant patient whether they received a cadaver transplant or living-related donor transplant, was still a noncompliant patient.
>
> Q: Is that criteria still the same today?
>
> A: Yes, it is.
>
> Q: So what you've characterized as an ethical decision in the April 30th, 1985 letter to Dr. McIntosh, is that a medical issue?
>
> A: It's an ethical issue. It's a medical issue. There are – there's a medical issue if you have concerns about your survival of the transplant. It's an ethical issue if you're concerned about subjecting a patient to an operation that they really don't need and even damaging them, their lives, as well as possible morbidity. I think that is an ethical issue.

Similarly, Dr. McIntosh's deposition testimony provided, at 74:

> [I]t's one of the greatest gifts somebody can give somebody, is to give them a kidney. On the other hand, if the recipient is going to turn around and not take the medication, and will reject the kidney, then I don't feel it ought to be done.

Dr. Sherman also testified as to this subject (Sherman Depo., at 5355; see generally 53-76):

> [Y]ou are asking whether there are different standards in regards to the narrow area of compliance issues when referring a patient for a cadaver kidney

– here, a difference of opinion among medical experts on the role of patient noncompliance in determining whether to refer to, and/or provide, a kidney transplant when there exists a potential living related donor – and is therefore nonactionable under principles of deliberate indifference.

To be sure, there is a "conflict" in the medical testimony concerning the appropriateness of transplanting a live donor's kidney into a noncompliant patient. However, as set forth above, a mere conflict in the opinions of experts over the quality of plaintiff's care is totally insufficient *in the Eighth Amendment context. Franklin, supra,* 662 F.2d 1337. Implicit in *Franklin* is that any conflict presented by the defendants must be bona fide, and where the evidence at all suggests that defendants' experts' opinions do not provide a bona fide conflict, the court, of course, would allow the issue to be decided at

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> or a living related kidney . . . Well, the answer to that question is of a qualified no, there is no difference in my mind. The qualification is the following: Since a patient referred for transplantation of a kidney needs to be a very compliant patient, that standard has to be met, in my mind, whether I'm referring for a cadaver or a living related. I can see, however, that there is some latitude in terms of compliance when dealing with a living related donor, because quite frankly, a living related donor can only give to a living relative, so that kidney is not available to the general pool of patients waiting for kidneys. . . . But quite frankly, I'm fairly strict about compliance issues as I am about other issues that I feel patients must meet before referral; so I don't refer patients who are not compliant.

trial. There is *nothing* in the evidence presented by plaintiff or defendants to suggest that the conflict is not bona fide. There is no evidence to suggest that defendants' experts are less than sincere in their beliefs, i.e., that they are fabricating the conflict, or that defendants' experts are the only medical professionals who hold the belief. While there is no doubt that a material issue of fact would exist if this were an ordinary malpractice case, there is no doubt in the court's mind that no evidence has been presented by which the defendants could be termed criminally reckless for not referring plaintiff for a transplant during the undisputed period of time that plaintiff was noncomplaint.

Nor is it dispositive here that issues of fact exist with respect to defendants' other possible improper motivations that worked to delay plaintiff's transplant, e.g., Drs. McIntosh and Victorino allegedly did not think that "lifers" should have transplants, or they did not like plaintiff because he was a "troublemaker."

The myriad factors that may have contributed to the denial of plaintiff's "referral" to PMC prior to April 17, 1985, recede in importance in light of Dr. Graber's confirmation of plaintiff's noncompliance. As demonstrated, such noncompliance could legitimately serve as the basis for defendants' declining to refer plaintiff for either a cadaver or living related donor transplant. Factual resolution of the rationale underlying defendants' failure to refer plaintiff to PMC before April 17, 1985, is therefore not material. Given Dr. Graber's testimony, defendants have met their burden of demonstrating that plaintiff's noncompliance served as a "motivating" or "substantial" factor in defendants' refusal to refer plaintiff earlier. *See*

Mt. Healthy City School District v. Doyle, 429 U.S. 274, 285-87, 97 S. Ct. 568, 575-76, 50 L. Ed. 2d 471 (1977). Plaintiff is effectively precluded from arguing that any other factor – any constitutionally impermissible factor – may also have served as the rationale for defendants' pre-April 1985 delay. A result reached for both constitutionally protected reasons and unprotected (actionable) reasons is valid if the protected reasons served as a substantial or motivating factor in the decision. *Id.*

Accordingly, the court concludes that there is no basis for finding deliberate indifference on the part of defendants for their failure to refer plaintiff for a transplant evaluation prior to April 17, 1985, and recommends that defendants' motion for summary judgment be granted as to all defendants based on plaintiff's claim of deliberate indifference in obtaining a transplant during this period of time.

(ii) Delay In Obtaining Transplant – April 1985 to February 1987

However, as discussed in detail below, there remain genuine issues of material fact in the Eighth Amendment context regarding the reason(s) for the delay in plaintiff's evaluation for and receipt of a transplant *after* April 17, 1985, particularly in light of defendants' observations of plaintiff's increased compliance. Such observations abrogate the "unanimity" of opinion on this rationale for delay that existed in the pre-1985 period, and render defendants' general "excuse" of patient noncompliance possibly disingenuine. Moreover, the nearly two-year delay from initial referral to actual transplant stands in

stark contrast to the normal one to three month evaluation and transplant process.[12] As set forth below, the factual disputes underlying this period are numerous and significant.

It is undisputed that plaintiff's brother and sister each wrote a letter to Dr. McIntosh in December 1984, in which they expressed their willingness to donate a kidney to plaintiff. Exhibit D to Schwartz Decl., Exh. 3 and 4 to McIntosh Depo.;[13] This contact was noted in plaintiff's medical record. Exh. 6, 7, and 8 to McIntosh Depo. Almost immediately, on January 24, 1985, Dr. McIntosh noted that plaintiff was "more cooperative." Exh. 8 to

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[12] It normally took PMC "from one to three months" "from the time a referring physician referred a patient for a potential [living-related] transplant to the time a transplant would take place with a donor of the kidney," "three months [ ] on the average." Levin Depo., at 37. This would include the time necessary to interview the donor and perform preoperative tests. *Id.*, at 38.

[13] While the parties dispute whether defendants were earlier aware of the availability to plaintiff of living related donors, these letters were apparently the first written communications to PMC regarding the availability of his relatives. Moreover, the court has established that prior to April 17, 1985, the question of donor availability is only relevant to the question whether defendants were *then* obligated to refer plaintiff to PMC for transplant evaluation, such obligation being a matter of professional disagreement which is nonactionable under principles of deliberate indifference (only Dr. Graber holding the expert opinion that such availability created an obligation to make an immediate referral). However, as discussed *infra*, resolution of this factual dispute *after* April 17, 1985 may be important to resolving the real reasons underlying defendants' post-referral delay and whether these are actionable under principles of deliberate indifference.

McIntosh Depo.). Plaintiff's siblings again wrote Dr. McIntosh, apparently in February 1985, to express their availability as potential donors. Exhibit D to Schwartz Decl., Exh. 5 to McIntosh Depo.

Dr. McIntosh thereafter wrote his first letter to Dr. Levin regarding plaintiff. This letter, written April 17, 1985, recounts plaintiff's history of noncompliance, but states that Dr. McIntosh was reconsidering this factor in light of the availability of plaintiff's siblings as potential living related donors. Exhibit 9 to McIntosh Depo.; Exh. D. to Schwartz Decl.[14] However, at his deposition Dr. McIntosh testified that he considered plaintiff to be compliant enough to receive a kidney transplant at the time he wrote this initial letter to Dr. Levin. McIntosh Depo., at 190; *see also* McIntosh's Amended Decl., Exh. H to Schwartz Decl., at p. 5, para. 13 ["[a]t the time when Raymond's brother agreed to provide Raymond with one of his own kidneys, Raymond was a better risk as his drug abuse did not appear to be such of a problem [sic], nor was his attitude quite so negative and noncompliant"]. The April 17 letter also recounts Dr McIntosh's own criteria for making a transplant referral, which he himself characterized as "arbitrary."[15]

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[14] Dr. McIntosh also stated that plaintiff had been a "real troublemaker," who had been belligerent and abused drugs, and "[b]ecause of all the problems I have had with Raymond, I have refused to submit him for a cadaver kidney." Exh. 9 to McIntosh Depo.

[15] Dr. McIntosh stated that he had "arbitrarily set certain criteria" for patients that he would refer for transplant. He would not recommend anyone until they had been at the prison for a year, so he could monitor their compliance. He tended to

Following receipt of Dr. Levin's letter of April 30, 1985 (in which Dr. Levin stated that plaintiff's case "represents an interesting ethical problem," and suggested that plaintiff's siblings could be interviewed by PMC (Exhibit 10 to McIntosh Depo.; Exh. D. to Schwartz Decl.), Dr. McIntosh again wrote to Dr. Levin. In this second letter, dated May 13, 1985, Dr. McIntosh stated that "Raymond has, in fact, recently been easier to deal with . . . ," and forwarded to Dr. Levin the letters and addresses of plaintiff's siblings. Dr. McIntosh stated that "I will leave it to you to contact them." Exh. D. to Schwartz Decl., see also McIntosh Depo., at 267-68.[16] Plaintiff's increased compliance at this time was also noted by Dr. McIntosh in a May 22, 1985 medical record notation, which stated that plaintiff was "more compliant" and had a "better attitude." Exh. 11 to McIntosh Depo.

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recommend those prisoners who had long sentences, not those with sentences under four years. However, he acknowledged that he had "at times arbitrarily decided that a patient was not fit for a transplant . . . " Exh. 9 to McIntosh Depo., *see also* McIntosh Depo., 168-170.

[16] Dr. McIntosh stated in pertinent part: "Raymond has, in fact, recently been easier to deal with and most of my staff at the prison would like to see him get transplanted if for no other reason than to get him off their backs. I recognize that is not a very good reason for transplanting somebody. The brother and sister have already instigated an investigation and we had inspectors in the state come down and find out what Raymond's transplant status was. In view of the fact that he has been more compliant and with pressure being brought by the family, it is probably worthy of consideration and I leave it to you to contact them. May 13, 1985 letter to Dr. Levin, Exh. D to Schwartz Decl.

It may have been the perception of defendants during this period of time that PMC had in fact undertaken the transplant evaluation, and begun to interview the potential donors. On May 22, 1985, Dr. McIntosh noted "Pacific Med Center to contact Raymond's brother and sister." Exh. 11 to McIntosh Depo. A July 11, 1985, entry by Nurse Erly states "still awaiting news of transplant from PMC." Exh. 12 to McIntosh Depo.

However, Dr. Levin apparently did not consider plaintiff to be a transplant candidate at the time of Dr. McIntosh's first letter, due to Dr. McIntosh's concern with plaintiff's noncompliance. Levin Depo., at 50-52, 53, 58.[17] Dr. Levin stated that he did not expect to hear from Dr. McIntosh again regarding plaintiff unless Mr. Jackson became compliant. However, Dr. Levin routinely stated that he assumed Dr. McIntosh wanted PMC to contact plaintiff's siblings, based on Dr. McIntosh's letter of May 13, 1985, but "I can't tell you what happened . . . Obviously, he eventually got transplanted, so they must have been contacted, but when that happened, who did it, and how that happened, I cannot tell you." Levin

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[17] As set forth in Dr. Levin's deposition, at 53:

> Q: When you wrote the April 30th, 1985 letter to McIntosh, did you have an expectation that McIntosh would write back to you or contact you again regarding Jackson, or did you assume that Jackson was a closed issue?
>
> A: No. I mean, I don't think I though about it one way or the other. I thought if the noncompliance became compliant, he'd write back to me. If he did not change the compliance, I would never hear from him again.

Depo., at 54, 57, 59-61. *Cf.*, Amended Decl. of Dr. McIntosh, Exh. H to Schwartz Decl., at p. 6, para. 18 ["[t]he fact that Raymond did not receive his kidney right away was the result of numerous factors, including his drug abuse, his noncompliant attitude, necessary testing that had to go on and such"].

Dr. McIntosh testified that once he learned of the unavailability of plaintiff's siblings, he did not follow up to attempt to contact them; he viewed this as PMC's responsibility. McIntosh Depo., at 133, 135, 158, 193. Moreover, he believed that PMC, not CMF, had made the determination that plaintiff's siblings were unavailable. *Id.*, at 133-134. Consistent with this view is Dr. Levin's testimony that it was the responsibility of PMC's transplant coordinators to arrange interviews with potential donors. Levin Depo., at 27, 61.

However, PMC's perception of the unavailability of plaintiff's siblings was apparently based on information provided by CMF. PMC's Transplant Coordinator, Kathy Tevis, wrote a letter to Dr. McIntosh dated September 18, 1985, in which she stated "[a]fter contacting the Dialysis Unit to get the names and addresses of Raymond's brother and sister, I was informed that they no longer want to be considered as possible donors." Exh. D to Schwartz Decl., Exh. 15 to McIntosh Depo. A September 5, 1985 entry by Nurse Erly provides: "patient stated to staff that his brother and sister are no longer available for kidney donation because of incarceration and illness respectively. Dr. Mac will write PMC." Exh. 13 to McIntosh Depo.

There were also issues surrounding the availability of plaintiff's mother as a potential donor. According to plaintiff, before his mother died January 10, 1986, she expressed the wish to donate one or more kidneys to plaintiff. Complaint in Civ. S-911624, at p. 17, para. 66. Plaintiff conveyed this information to Dr. McIntosh, and asked him to determine whether her kidneys would be a compatible transplant. Jackson Depo., at 80-85; Exh. 1 to Jackson Depo. (Appeal Form dated December 26, 1985, and January 16, 1986, in which plaintiff begs inquiry into his mother's health and availability as donor); and Exh. 17 to McIntosh Depo., in which Dr. McIntosh acknowledged awareness of plaintiff's mother's illness in a medical notation December 19, 1985 ("[plaintiff] [d]epressed (mother ill)"). Dr. McIntosh stated in his deposition that "Raymond was upset and depressed because his mother was very sick, and asked about her as a donor." McIntosh Depo., at 130-131. However, while Dr. McIntosh apparently looked into this possibility, he did not follow through on it in any meaningful way.[18]

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[18] As set forth in Dr. McIntosh's deposition (McIntosh Depo. at 130-132):

> Q: Did you ever become aware that Raymond's mother was willing to donate a kidney?
>
> A: . . . I called the hospital where she was ill, and the nurse told me that she was not critical and she wasn't going to die.
>
> Q: Did you call because the mother was a potential kidney transplant donor?
>
> A: I called because Raymond asked me to see if she was a potential donor.

Plaintiff again became noncompliant. On September 5, 1985, Nurse Erly noted that plaintiff was "very angry with staff since outlook for transplant from relatives is dim." Exh. 13 to McIntosh Depo. On the same date, Dr. McIntosh noted that "Ever since potential sib transplant has fallen through (brother in jail, sister sick) Raymond's personality has changed back to hostile and aggressive and abusive." Exh. 14 to McIntosh Depo.

Plaintiff thereafter filed his first and second petitions for writ of habeas corpus on September 9, 1985, and

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Q: What did you ascertain?

A: All I could get from the nurse was that she was not critical, and didn't look like she was going to die.

Q: And was it your understanding that she would only be considered as a kidney donor as a cadaver kidney? In other words, was there any possibility of her donating a kidney while she was still alive?

A: I don't think that came up at all. I was not aware that she was a potential donor.

Q: Did she die?

A: She died.

Q: When did she die?

A: I don't know the date.

Q: Is possible that after she died she could have donated one of her kidneys?

A: I don't know, because I don't know the cause of her death, or the situation at her death.

Q: Did you do anything to try to ensure that the hospital would contact you in time?

A: No.

Q: Were you asked to do anything like that?

A: No.

October 17, 1985, respectively. Drs. Victorino and McIntosh provided declarations in these proceedings, stating, *inter alia*, that plaintiff's siblings were unavailable as donors, and plaintiff was not a proper candidate for a transplant due to his noncompliant behavior – Dr. Victorino in a November 19, 1985 declaration to the Superior Court,[19] and Dr. McIntosh in a January 30, 1986

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[19] The November 19, 1985 Declaration of Dr. David Victorino, filed in the California Court of Appeal, First Appellate District, provided in pertinent part (Exh. 37 to McIntosh Depo.):

> 5. Petitioner has been considered on several occasions for a kidney transplant. At one point, his brother and sister both volunteered to donate their kidneys. His brother, however, is presently in jail and his sister is ill so neither of them can donate their kidney. It is thus necessary for petitioner to secure a cadaver kidney.
>
> 6. Petitioner was referred to the Pacific Medical Center in San Francisco regarding a cadaver donor. The doctors at the Pacific Medical Center turned down his request for a kidney transplant because petitioner is generally noncompliant. Petitioner has shown by his behavior to be unreliable and unwilling to make a consistent committment [sic] to the necessary treatment preliminary to kidney transplant . . . Given the severe shortage of kidney donors that exists at all hospitals it is simply not prudent to transplant a kidney into a patient who has shown a general propensity to be uncooperative in his treatment.
>
> 10. Every effort has been made by the doctors, nurses and medical staff at CMF to ensure petitioner's longevity and increase his level of cooperation. Petitioner, however, remains resistive and significantly uncooperative as regards treatment.

declaration to the Court of Appeal.[20] These sentiments were echoed by CMF Superintendent Eddie

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Unless and until petitioner shows a history of being willing to cooperate with the necessary treatment in kidney dialysis, he is simply not a viable candidate for kidney transplant.

[20] The January 27, 1986 Declaration of Dr. McIntosh, filed January 30, 1986 in the Solano County Superior Court, provided in pertinent part (Exh. D to Schwartz Decl.; Exh. 92 to McIntosh Depo.):

3. Jackson has been considered for a kidney transplant for some time. I have been reluctant to consider Jackson for a cadaver kidney because he has a history of non-compliance with his medical treatment and of drug abuse. Jackson has refused to follow his prescribed diet, and he does not leave the kidney dialysis machine alone to function properly. If Jackson was to continue such non-compliant behavior after a transplant, his body would likely reject the new kidney.

4. Because Jackson's brother and sister volunteered to donate a kidney, I contacted Pacific Medical Center (PMC) in San Francisco and explained the situation regarding a possible transplant. Kidney transplants are not done at CMF; patients are referred to PMC and the operation is performed at PMC only upon the approval of PMC.

5. When Jackson's siblings volunteered to donate a kidney, Jackson made every effort to be compliant and cooperative. In April 1985, PMC agreed to talk to Jackson's siblings. His sister, however, became ill and was unable to donate a kidney, and his brother was sentenced to prison. Jackson subsequently became hostile and aggressive and resumed his non-compliant behavior.

6. It is my opinion that it would be a breach of my professional ethics and duty to remove a kidney from

Ylst,[21] and CMF Chief of Inmate Appeals Senon

> Jackson's brother or any other volunteer. In addition to his refusal to cooperate in his dialysis treatment, Jackson is essentially a drug addict who attempts to manipulate doctors and medical staff for purposes of obtaining drugs. Based on his longstanding behavioral patterns I feel that there is a substantial likelihood that his actions will result in his body rejecting a new kidney. Therefore, I do not believe that he is a viable candidate for either a cadaver or donor transplant at this time.

An earlier outpatient medical record notation by Dr. McIntosh, dated November 6, 1985, similarly states that "I cannot recommend someone for a transplant who cannot be trusted, as it requires a reliable and trustworthy patient to take the medicine necessary to prevent rejection of the transplant. I have told Raymond that it is up to him and he continues to exhibit behavior that makes him difficult to trust." Exh. 93 to McIntosh Depo.; McIntosh Depo., at 366-67.

These sentiments were again expressed by Dr. McIntosh in a letter "To Whom It May Concern," written January 17, 1986. Exh. 20 to McIntosh Depo. However, within this letter Dr. McIntosh wrote, "[a]t that time [when plaintiff's siblings became unavailable as donors], Raymond has been making every effort to be compliant and cooperative, and I told him that if he continued in that behavior that I would reconsider him for a cadaver kidney." *Id.*

[21] In November 1985, CMF Superintendent Eddie Ylst stated that plaintiff's siblings were unavailable and that he would not be considered for a cadaver transplant unless he became more compliant. Superintendent Yslt stated in pertinent part (Exh 16 to McIntosh Depo.):

> Nurse Champion was interviewed and she stated that you meet most of the requirements for a kidney transplant and that you have the right to request consideration for a transplant. Dr. McIntosh

Palacioz,[22] in response to plaintiff's inmate appeal to have his name put on a transplant list.

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submitted your name to the Pacific Medical Center for consideration of a cadaver kidney; however, due to your noncompliance of dialysis patient medical regimens, you were rejected by Pacific Medical Center.

Your name was again submitted to Pacific Medical Center because you indicated that there were two (2) family members willing to donate a kidney to you. You informed Nurse Champion later that the two (2) family members were no longer accessible due to your sister's ill health and your brother's unavailability since he was incarcerated. Due to the fact your donors were no longer available, your name was dropped from the list. Dr. McIntosh informed you that until you were more conscientious [sic] in your medical regimen, you would not be acceptable to Pacific Medical Center for further consideration as a recipient of a cadaver kidney.

[22] Chief of Inmate Appeals Senon Palacioz stated on January 16, 1986, in pertinent part (Exh. D to Schwartz Decl.):

After review of your appeal, discussion with CMF Medical staff and yourself, it appears that your request to be put on a list for a medical transplant was denied by the Pacific Medical Center because of your non-compliance to the treatment now being offered you. This means that you are not following the doctor's orders, not taking the prescribed treatment as ordered, and generally lacking responsibility in attending to dialysis treatment. I am informed that you are continuously late for your dialysis treatment and was [sic] recently in possession of numerous contraband medication.

Nurse Champion indicates that your two family members, who wish to donate a kidney to you, are no longer available because of your sister's illness and

However, by March 4, 1986, Dr. McIntosh again noted plaintiff's compliance, stating that plaintiff "seems to be keeping a low profile, not as demanding or aggressive." Exh. E to Schwartz Decl.; Exh. 90 to McIntosh Depo., McIntosh Depo. at 361. As Dr. McIntosh stated in a January 15, 1987 medical summary, plaintiff "has had enough of a personality change and improvement that it was felt that he could be offered a kidney transplant, particularly as he had both a brother and sister who had desired to offer a kidney."[23] Exh. D. to Schwartz Decl.

According to Dr. Levin, plaintiff's compliance served an important factor in PMC's decision to transplant plaintiff. Levin Depo., at 48-49.[24] The January 3, 1986 representation of Leona Aina, PMC's Director of Quality

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your brother's incarceration. It appears that you need to become more conscientious in your medical program before your name will be resubmitted to the Pacific Medical Center requesting that your name be put on the list for a kidney transplant.

[23] Dr. McIntosh's reference at the beginning of this sentence to "during the last several years" is reasonably subject to varying interpretations regarding whether it applies to plaintiff's "personality change and improvement."

[24] As set forth in Dr. Levin's deposition, at 48-49:

Q: You, nonetheless, eventually did approve him for a transplant; did you not?

A: That is correct.

Q: And why did you?

A: I believe that there was a period of waiting time, and Dr. McIntosh, I think, informed us that the patient had become more compliant in his estimation and, therefore, there was reason to go ahead.

. . . A: The only information I would have had to receive was some reassurance or an opinion from Dr.

Assurance and Risk Management, is not inconsistent with Dr. Levin's view. Levin Depo., at 62; Exh. 6 to Levin Depo.[25] The import of Ms. Aina's letter and Dr. Levin's testimony is that the only referral of plaintiff from CMF to PMC was based on the availability of his siblings as potential donors.

That plaintiff was not previously referred to PMC for a cadaver transplant, according to Dr. Levin, is inconsistent with the Declaration of Dr. Victorino. *See* note 20, *supra*.[26] It is also inconsistent with the statement of

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McIntosh that he felt the patient was now compliant enough to undergo the procedure.

[25] Ms. Aina's letter of January 3, 1986 to the Prison Law Office provided in pertinent part (Exh. 6 to Levin Depo.):

> [The] allegation that we denied Mr. Jackson a transplant because of his noncompliance with dialysis had no foundation. As stated earlier, we were only referred him as a living related transplant, and since his brother and sister who were originally being considered as donors changed their minds, he no longer had candidates to receive a living related transplant.

Dr. Levin described the first sentence of this excerpt as incorrect, emphasizing that noncompliance did provide a sufficient rationale to deny plaintiff a transplant. Levin Depo. at 63.

[26] In his October 1993 deposition, Dr. McIntosh stated that he did not know to what Dr. Victorino referred in his 1985 declaration that "Petitioner has been considered on several occasions for a kidney transplant;" McIntosh Depo., at 276; that Dr. Victorino's statement "[i]t is thus necessary for petitioner to secure a cadaver kidney," was untrue; *id.*; that plaintiff had never been considered for a cadaver kidney, or referred to PMC for such consideration; *id.*, at 277, 278; that he was unaware of any circumstances that would support Dr. Victorino's statement

Superintendent Ylst and, to a lesser extent, the statement of Chief Palacioz. *See* notes 22 and 23, *supra*. Dr. Victorino and McIntosh later testified in deposition that their declarations may not have been personally prepared by them, Victorino Depo. at 44-59, McIntosh Depo at 366, Dr. Victorino stating that some of the information in his declaration was based on hearsay, Victorino Depo., at 50. This admitted lack of accuracy in documents submitted to the state courts undermines the credibility of the defendant(s), and underscores the necessity of resolving the factual disputes which these documents purported to address.

The transplant was finally arranged after Dr. McIntosh met with plaintiff's brother. At the time, the brother was incarcerated at CMF-South. The meeting was initiated either by the brother or Dr. McIntosh. McIntosh Depo., at 142, 144-146. Dr. McIntosh decided to recommend the transplant upon determining the brother's willingness to donate a kidney, and due to plaintiff's increased compliance. McIntosh Depo, at 142, 146-147;[27]

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that "[t]he doctors at the Pacific Medical Center turned down his request for a kidney transplant because petitioner is generally noncompliant;" *id.*, at 277; and, implicitly, that plaintiff had not been referred to PMC prior to Dr McIntosh's own April 1985 referral; *id.*, at 277-278.

[27] As set forth in Dr. McIntosh's deposition:

Q: Was there anything else that led to the receiving of that transplant?

A: And at the time, Raymond was being very compliant, very – keeping a very low profile.

Q: What does that mean?

McIntosh's Amended Decl., Exh. H to Schwartz Decl. at p. 5, para. 13.

This lengthy rendition is intended to illustrate the genuine issues of material fact that pervade the delay in plaintiff's transplant in the post-referral period. To what extent did plaintiff's compliance actually influence Dr. McIntosh's decision to refer plaintiff to PMC? Was Dr. McIntosh's view in this regard consistent throughout the relevant period? Was there a duty on defendants' part to pursue the availability of plaintiff's relatives as possible donors? Should Dr McIntosh have more clearly initiated and pursued the evaluation procedure, and/or was this PMC's responsibility? To what extent did the misinformation set forth in Dr. Victorino's declaration and Superintendent Ylst's letter factor into the delay? These questions raise a reasonable inference in plaintiff's favor that the

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A: He wasn't causing trouble, he wasn't arguing, he wasn't manipulating.

. . . Q: What did that have to do with his ability to care for a transplanted kidney?

A: It had to do with my ability to trust him, to be able to communicate with him.

. . . Q: But you say at that time, in February 1987, he was compliant and no longer exhibiting this behavior?

A: Correct.

Q: For how long a period of time had he been compliant?

A: I don't remember. It was a number of months.

Q: Approximately how may months?

A: I would be guessing, four to six months.

McIntosh Depo., at 142-144.

delay in obtaining his transplant after April 17, 1985, was due to factors other than his noncompliance, including a possible indifference to any meaningful followup.[28]

Moreover, as this court previously concluded, plaintiff has submitted other evidence which supports his theory that the transplant was finally performed only because he instituted legal actions. Sept. 11, 1992 Findings and Recommendations, at 17-19. Defendants' own moving papers illustrate, rather than resolve, these factual disputes. Motion, at 47-54.

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[28] That factual disputes underlying these questions are underscored by the issues posed by the Court of Appeal in October 1986, directing the Superior Court to conduct an evidentiary hearing (*see* discussion, *infra*, regarding the res judicata effect of the 1986 order of the Superior Court):

> 1. Is petitioner's brother or sister available as a donor of a kidney to petitioner?
>
> 2. Has the department medical staff determined whether petitioner would cooperate in his medical treatment is he received a kidney transplant?
>
> 3. Does petitioner have a past and/or present problem of drug abuse? Does such problem, if found, affect the decision to transplant and if so, how?
>
> 4. Did Pacific Medical Center reject petitioner as a candidate for a kidney transplant? If they did reject petitioner, what was the reason and is the reason verifiable?
>
> 5. Is the current decision not to have petitioner evaluated for a kidney transplant by Pacific Medical Center based upon sound medical opinion?

Court of Appeal order filed Oct. 7, 1986; Defendants' Exh. 26.

In summary and put simply, a trier of fact could disbelieve the on-again-off-again statements of defendants concerning compliance, or whatever other excuse defendants were offering during the April 1985-February 1987 period of time, and could rationally come to the conclusion that the defendants were at this point failing to act for no proper medical reason with knowledge that plaintiff was suffering from this failure to act. The state of the evidence in this latter period stands in stark contrast to the former period where all agreed that plaintiff was noncompliant. Defendants' motion for summary judgment on plaintiff's claim of deliberate indifference in obtaining a transplant during this period of time should be denied.

The defendants subject to this ruling are Drs. McIntosh and Victorino. It is undisputed that Dr. McIntosh had the primary responsibility for making a transplant referral to PMC. McIntosh Depo., at 65 ("Q: Are you the only staff member at CMF who has the responsibility to recommend or not recommend an inmate for a kidney transplant? A: Yes."); Levin Depo., at 59 ("[t]he decision is – the referral is Dr. McIntosh's and the decision to transplant is mine").

While defendants seek to limit the referral decision to Dr. McIntosh, thus relieving Dr. Victorino of any responsibility in this decision, plaintiff has presented sufficient information to support a reasonable inference that Dr. Victorino placed a more active role. Dr. Victorino was Acting CMO at CMF from the early part of 1985 until mid-1987. Victorino Depo., at 16-17, 14. Dr. Victorino's own deposition provides that he had "ultimate supervisory responsibility for authorizing the decision whether

or not to recommend Raymond for a transplant," Plaintiff's Exhibit I, at 61-62 (bolstered by McIntosh's Deposition at 147 ["I think I may have gone through the chief medical officer . . . "]). Plaintiff also relies on Dr. Victorino's "malicious and false declaration" in response to plaintiff's state habeas corpus petition, which provided the cornerstone for the state court's denial of review of the transplant decision-making process, but has since been refuted even by Dr. McIntosh.

While defendants contend that Dr. Victorino only "facilitated" the decision made by Dr. McIntosh, thus permitting CMF to become financially obligated to pay for the surgery, Defendants' Reply, at 10, and that Dr. Victorino merely "explained" plaintiff's case to the Solano County Superior Court, *id.*, at 11, plaintiff's evidence is sufficient to establish a material issue of fact in plaintiff's favor that Dr. Victorino was involved in the decision whether to accord plaintiff a transplant.

However, with respect to the dialysis unit's nurses and MTAs, that is defendants Crump, Lambert, Downing, Goodman, Erly and Friedline, summary judgment should be granted with respect to plaintiff's claim of delay in obtaining a transplant.

Plaintiff names these defendants individually and in their official capacity as direct participants in the decision to deny plaintiff's transplant, (1) through their reports and interdisciplinary meetings (particularly based on nurse Erly's deposition testimony, Exh. L to Schwartz Decl.), and (2) because someone on the dialysis unit ("falsely") stated to PMC's Transplant Coordinator Kathy

Tevis that plaintiff's siblings were no longer available to donate a kidney.

Defendants assert that summary judgment is warranted as the these defendants because (1) staff reports (and presumably staff meetings) are too tangential from the decision-making process to accord these staff members the requisite personal involvement therein, and *inter alia*. (2) even assuming a CMF staff member informed PMC that plaintiff's siblings were unavailable, there is no evidence to link these defendants to the alleged communication. The court agrees. Plaintiff's attempt to attribute decision-making authority to the nursing and MTA staff is not supported by the evidence upon which he relies, defendant Erly's deposition.[29] Moreover, plaintiff's allegation that "someone" on the dialysis unit staff misspoke to Ms. Tevis is too attenuated to support plaintiff's claim. Put simply, plaintiff has adduced no evidence that indicates that specific non-physician defendants improperly acted or failed to act with actual knowledge of an obvious

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[29] Plaintiff relies on Erly's statement that "I believe he [Dr. McIntosh] probably was using that [the input of Erly and other members of the dialysis unit staff] as part of the information to make [his] decision." Erly Depo., at 31. Plaintiff also relies on Erly's testimony that the transplantation of plaintiff probably came up at interdisciplinary staff meetings.

However, plaintiff's interpretation of these statements – that these demonstrated that Erly and other staff had an active role in actual decision making – is entirely dissipated by the rest of Erly's testimony. Defendant Erly testified in pertinent part that "I reported to Dr. McIntosh in my role as a nurse . . . " Erly Depo., at 31; "I gave Dr. McIntosh the information that I had at hand. If he used that to assist in his decision, then that was up to him," *Id.* at 32.

risk of harm to plaintiff stemming from their actions. While plaintiff may wish to collectively indict the non-physician defendants' the law demands individual proof.

2. Pre-Transplant Dialysis Care

This court looked closely to determine whether plaintiff was attempting to state a claim that his dialysis treatment itself was constitutionally deficient leaving aside the issue of whether plaintiff should have been given a transplant. Defendants were legitimately uncertain about this and the complaint could be read in various fashions. Therefore, defendants moved for summary judgment on discrete issues concerning the dialysis itself: the utilization of peritoneal dialysis; whether inmates were allowed to unduly tamper with plaintiff's dialysis; whether plaintiff was given shortened dialysis sessions; whether plaintiff's dialysis was unduly painful.

Having the benefit of hindsight acquired after review of plaintiff's brief, it became clear to this court that plaintiff was utilizing the allegations of dialysis treatment to highlight the need for transplant which would have obviated the dialysis problems, and was not attacking the dialysis methodologies themselves as being constitutionally deficient.[30]

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[30] Plaintiff complained that his dialysis necessitated repeated blood transfusions, and resulted in complications of seizures, pruritus, pseudogout, anemia, pericarditis, and enlarged heart, fluid retention, cramping, nausea, vomiting, hypotension, asthma, and depression. Plaintiff also alleges that his life span has been shortened, and that he has emotional

This fact was as much conceded by plaintiff's counsel during a question and answer period in Dr. Grabers' deposition:

> Mr. Schwartz: Can I interrupt a minute?
>
> Mr. Cashdollar: Sure.
>
> Mr. Schwartz: *We're not claiming that he was medically inappropriately cared for.*

Graber's Depo. at 160-161 (emphasis added)

Moreover, the deposition of Dr. Graber references the problems encountered with the dialysis, but in no way references an opinion of Dr. Graber that defendants were proceeding with the dialysis methodology itself in deliberate indifference to plaintiff's care. For example, Dr. Graber testified that while dialysis itself should not be painful, insertion of the needles may be, particularly if there is an infection or blood clot at the insertion site. Graber Depo., at 70, 81-84. However, neither infections or clotting are unusual. *Id.* at 151. And, while the number of shunts and grafts experienced by plaintiff was "on the high end of the range," and a "little unusual," it was not

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problems caused by the extended dialysis treatments. The court can only read these allegations as injuries plaintiff allegedly suffered on account of having to undergo dialysis for a lengthy period of time, i.e., on account of having been denied a transplant.

extreme. *Id.* See also, Graber Depo., at 152-153.[31] This court cannot find any opinion by Dr. Graber that asserts

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[31] Dr. Graber testified (Depo., at 152-153):

Q: So the circumstances of the shunts and grafts and the number of times that he experienced clotting, infections, etc. that was not a problem?

A: He had a period in the early 1980s when he had a lot of shunts and grafts, and I think that period was a little bit unusual. And he then ended up with a graft in his leg, which is unusual and more uncomfortable than the normal arm type of graft, both to walk around with and to be dialyzed through. That graft appeared to remain stable after, I guess, 1984 – sorry – 1982. After that I don't think he had any unusual complications. He did have, as I've said, a fairly severe number of graft complications.

Q: Did any of it suggest to you that Dr. McIntosh or any of the other physicians, including the surgeons that installed these devices, acting inappropriately in installing these devices?

A: No.

Q: So these people apparently used their medical judgment and their decisions were appropriate?

A: I think so, yes.

Q: And especially the one in the leg [groin], because apparently you said it was successful?

A: It was successful, yes. Normally, one would only place that kind of graft as a last resort if there were no accesses available in the arms. And I'm making the assumption that was the case.

Q: Is there anything in the record to suggest that they should have used some other site, other than the leg?

A: Not that I saw. No.

Q: Now, we talked about the complications with respect to the shunts and the grafts. If I asked you if

the dialysis treatments were characterized by deliberate indifference. Certainly, the methodology of dialysis treatment is beyond the ken of a lay trier of fact. If plaintiff intended to oppose defendants' motion on the dialysis treatment issues, expert opinion was required in order to raise a material issue of fact.

Thus, in one context, defendants' motion with respect to events in the dialysis treatment itself should be denied as addressing claims that are not in this case. However, for the purposes of alleviating any confusion on the issue, defendants made a prima facie motion on the quality of the dialysis treatment, and plaintiff has not opposed that motion, nor produced evidence that would raise a material issue of fact that defendants acted with deliberate indifference in conducting the dialysis. Defendants' motion should be granted on the pre-transplant dialysis care issues.

3. Conspiracy

In Civ. S-92-1624 (at pp. i, 4-7, 36-40 of his complaint), plaintiff sets forth a number of alleged facts to support

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he had any complication with respect to the vascular access sites, is that all part of the same answer you gave just a moment ago?

A: Yes. Vascular access sites means shunts and grafts. Yes.

Q: Apparently, these patients have problems with these things; is that correct?

A: They do. Mr. Jackson had a high number of problems. It wasn't extremely unusual. He had a high number.

his cause of action based on "Conspiracy and False Statements." Plaintiff alleges that defendant McIntosh, Victorino and members of the dialysis unit staff conspired to deprive him of his civil rights, under 42 U.S.C. § 1985(3), and made false statements in violation of 18 U.S.C. . . . 1001.[32]

It is not true that every claim made under 42 U.S.C. §1983 can also be the subject of a conspiracy claim under §1985(3). The claims cognizable under § 1983 are much broader than the latter statute. Conspiracy claims made under § 1985(3) depend upon allegations of a class animus based on racial motivations unless the class involved is otherwise a suspect or quasi-suspect class requiring exacting scrutiny, or the class involved has been given special protection by Congress. *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536-1537 (9th Cir. 1992). Plaintiff does not allege that any defendants conspired against him on account of his race. Nor does it appear to the court that a class consisting of state prisoners is one that Congress has chosen to specially protect. Finally, given the strict standards governing the bringing of Eighth Amendment medical claim "prisoner" lawsuits which ordinarily do not apply to the general citizenry, plaintiff would be hard pressed to argue that he should be viewed as a member of a suspect or quasi-suspect class, the claims for which require more instead of less scrutiny.

With respect to a conspiracy claim based on 18 U.S.C. §1001, plaintiff has no right to base an action against state

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[32] Defendants Poulos, Ylst, and Henry, also named as coconspirators, have been dismissed.

employees on a criminal statute penalizing false statements made to federal officials.

Plaintiff's conspiracy claims should be denied.[33]

4. Plaintiff's Claim for Injunctive Relief To Obtain Medically Necessary Diet

Defendants seek summary judgment on plaintiff's claim for injunctive relief to obtain a medically-adequate post-transplant diet that is low in sodium (for hypertension) and dental soft (for gum problems resulting from anti-rejection medication). Defendants assert that this claim is moot because the diet is being provided. Motion, at 77-81.

In documents submitted by plaintiff in opposition to plaintiff's last motion for summary judgment, plaintiff indicated that he had been on a dental soft diet for some time, but did not receive a low sodium diet until June 28, 1991. Plaintiff's Exhibits 97 and 98, submitted with his Opposition filed January 28, 1992. Plaintiff testified at his deposition that he had been receiving a dental soft diet since his transplant, Jackson Depo., at 34-35, and a low sodium diet since the filing of an inmate appeal in 1990, *id.*, at 35. The recent receipt of a low sodium diet was

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[33] Even if plaintiff's conspiracy claims would be viewed under §1983, plaintiff gains nothing by simply restating his claims as a conspiracy. Defendants either participated in the deprivation of plaintiff's civil rights or they did not. Whether described as a "conspiracy" or some other type of improper conduct, defendants would still be liable.

acknowledged by plaintiff in Civ. S-91-1624, at 35, para. 100.

This court previously rejected defendants' motion for summary judgment on their claim that plaintiff need not, medically, remain on these diets. Sept. 11, 1992 Findings and Recommendations, at 27-29. Defendants state that this court therein identified a single defendant, Dr. Thor, with respect to the diet issue in Civ. S-90-760. Motion, at 77. However, as pointed out by plaintiff, the court specifically denied summary judgment on this issue as to *both* defendants McIntosh and Thor. Findings and Recommendations, at 29, para. 4. They remain the only defendants upon which this claim is based.

Plaintiff initially responds that defendants are not seeking summary judgment on plaintiff's claims for damages for injuries resulting from the defendants' past failure to provide this diet. While defendants assert that "[p]laintiff offers *no* evidence by way of his opposition to even suggest damages with respect to plaintiff's claim as to his special diets," Reply at 12-13 (original emphasis), plaintiff nonetheless seeks such damages, apparently with regard to his episodes of rejection, edema, and high blood pressure. Complaint in Civ. S-91-1624, at 34-35.[34]

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[34] In Civ. S-91-1624, plaintiff alleges that the denial of a low sodium diet violat*ed* "plaintiff's rights under the Equal Protection Clause, which is violative of the Sixth and Eighth Amendments to the United States Constitution." *Id.*, at 45, para. 145. Plaintiff seeks general damages for his pain and suffering, and a preliminary and permanent injunction to, *inter alia*, generally prohibit defendants from retaliating against plaintiff. *Id.*, at 47, para. 2(a). In Civ. S-90-760, plaintiff sought injunctive relief to consistently obtain a low sodium, dental soft diet.

Defendants having failed to move for summary judgment on this issue of damages, the court will not address it.

With respect to the injunctive relief which is sought in both actions, plaintiff responds that such relief is necessary to ensure that plaintiff will continue to receive the requested diet as long as it is medically necessary.

The facts of a case can indicate that a request for preliminary injunction has become moot. A controversy becomes moot, and a federal court is deprived of jurisdiction "when the issues are no longer "live" or the parties lack a legally cognizable interest in the outcome." *Lee v. Schmidt-Wenzel*, 766 F.2d 1387, 1389 (9th Cir. 1985). A "live" controversy is one that actually exists at all stages of the federal court proceedings. *Acosta v. Pacific Enterprises*, 950 F.2d 611, 616 (9th Cir. 1991).

A narrow exception to the mootness doctrine exists. If it can be shown that the situation is one that is "capable of repetition, yet evading review," then plaintiff may overcome the mootness of his request for injunctive relief. *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S.Ct. 279 (1911). To fall within this exception, the challenged action must be of an inherently short duration (too brief for effective judicial review), and there must be a reasonable expectation that the party raising the challenge will be subjected to the same type of action again. *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975). Nonetheless, a claim does not "evade review" when the court continues review of plaintiff's lawsuit on other remaining claims. *Wiggins v. Rushen*, 760 F.2d 1009, 1011 (9th Cir. 1985) (finding claim did not

evade review because the court reviewed plaintiff's claim under the damages portion of his lawsuit).

In the instant case, plaintiff's request for injunctive relief is moot. Since 1990, plaintiff has consistently received both a low sodium and dental soft diet. These issues are no longer "live." Further, while provision of the diet could be rescinded, plaintiff has not provided facts showing there is a reasonable expectation of such rescission, after four consecutive years on the diet. Additionally, defendants' provision of the diet does not come within the "inherently short duration" exception to the mootness doctrine, thus not "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC, supra*, 219 U.S. at 515. In any case, this court will continue to review plaintiff's remaining claims in both of his actions, including his claim for damages based on the earlier denial of the diet, and any subsequent change in plaintiff's placement will not evade review. Moreover, as defendants assert, plaintiff has other means for obtaining relief should the defendants discontinue the requested diet, e.g., through a writ of habeas corpus, or another claim under 42 U.S.C. § 1983.

Accordingly, the court recommends granting defendants' motion for summary judgment as to plaintiff's request for injunctive relief to provide a medically appropriate diet, as to defendants McIntosh and Thor. The court does not address plaintiff's claims for damages resulting from the allegedly prolonged denial in obtaining this diet.

5. Res Judicata Effect of 1986 Superior Court Order

Defendants assert that the res judicata effect of the March 19, 1986 decision of the Solano County Superior Court (Case No. 19146), dismissing one of plaintiff's three state court petitions for writ of habeas corpus, provides a sufficient basis for granting summary judgment in behalf of defendants on the question "whether plaintiff was entitled to a kidney transplant prior to 1987." Motion, at 87.

The petition at issue sought an order directing the California Department of Corrections to recommend plaintiff for a kidney transplant, based in part on plaintiff's claims of deliberate indifference in violation of the Eighth Amendment. Plaintiff's Exhibit 45 to his Opposition filed Jan. 22, 1992. The Superior Court, also on March 19, 1986, issued an order denying plaintiff's request for an evidentiary hearing, discharging its order to show cause, and dismissing plaintiff's petition for writ of habeas corpus, finding:

> It appears from the Affidavit of Duncan McIntosh, M.D., that Petitioner is a drug addict who attempts to manipulate doctors and medical staff for purposes of obtaining drugs. In addition, he refuses to cooperate in his dialysis treatment. This behavior indicates a substantial likelihood that if his actions were to continue, his body would reject a new kidney.
>
> This court concurs with the Attorney General, in that until petitioner shows an ability to cooperate with his present kidney dialysis treatment,

> he is not a viable candidate for a kidney transplant.

Defendants' Exhibit 26, at 2.

Subsequent to this finding by the Solano County Superior Court, the California Court of Appeal, First Appellate District, ordered the Superior Court to *reconsider* its decision. Defendants' Exhibit 26. This Court of Appeal order, dated October 7, 1986, directed the Solano County Superior Court to conduct an evidentiary hearing on several factual issues regarding plaintiff's request for a transplant. *See* n. 29, *supra*.

However, following plaintiff's kidney transplant on February 5, 1987, the Court of Appeal issued a second order dismissing the entire action as moot. The February 18, 1987 Court of Appeal order provided:

> This court having been informed that petitioner has received a kidney transplant, the petition for writ of habeas corpus is dismissed as moot and the order of this court dated October 7, 1986, requiring an evidentiary hearing is vacated.

Exhibit M to Schwartz Decl.

Defendants argue that "[s]ince no higher court *granted* plaintiff the relief he sought in the form of a kidney transplant, the decision of the Solano County Superior Court [is binding and] should be given res judicata effect." *Id.*, citing *Federated Dept. Stores. Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424 (1981). Emphasis added.

However, as plaintiff points out, "by no stretch of legal reasoning can the Superior Court's order be said to constitute a 'final judgment on the merits' of plaintiff's

claims . . . [since as] [d]efendants admit in their memorandum [ ] 'the California Court of Appeal, First Appellate District, ordered the Superior Court to reconsider its decision.' Defs' Mem. at 88; Defs' Mem. Exhibit 26." Opposition, at 66. Moreover, as plaintiff points out, following plaintiff's kidney transplant, the Court of Appeal issued a "final order" on February 18, 1987, dismissing the entire action as moot. *Id.* Exhibit M to Schwartz Decl.

Res judicata applies in civil rights actions brought pursuant to 42 U.S.C. § 1983. *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411 (1980). Basically, the doctrine precludes a party or his privies from relitigation of a *final* decision rendered by a state or federal court. *Id.* at 94.[35] It does not matter that the decision which is used to bar the relitigation of issues in a § 1983 case is a state habeas action. *Silverton v. Department of the Treasury*, 644 F.2d 1341, 1347 (9th Cir. 1981) ("because of the nature of a state habeas proceeding, a decision actually rendered should preclude an identical issue from being relitigated in a subsequent § 1983 action if the state habeas court afforded a full and fair opportunity for the issue to be heard and determined under federal standards").

The doctrine of res judicata (as opposed to collateral estoppel) applies not only to issues raised by the party to

---

[35] " 'Before the doctrine [of res judicata] may apply, there must be (1) a valid, final judgment, (2) rendered on the merits, (3) a subsequent action involving the same parties or those in privity with them, (4) that is based on the same cause of action or claim.' " *Munoz v. County of Imperial*, 604 F. 2d 1174, 1177 (9th Cir. 1979), quoting *Hooker v. Klein*, 573 F. 2d 1360, 1367 (9th Cir. 1978).

be bound by the doctrine, but also issues that *could have been raised* in the first action. *Migra v. Warren City School Dist.*, 465 U.S. 75, 104 S.Ct. 892 (1984) (applying this general doctrine in a §1983 suit).

In determining the preclusive effect of a prior state action on a later filed federal § 1983 action, the federal court *must* apply the preclusion law of the *state. Allen v. McCurry, supra,* 449 U.S. at 96. *See also, Plaine v. McCabe,* 797 F.2d 713, 718 (9th Cir. 1986).

The analysis of the Attorney General fails at this point, in his contention that a petitioner who loses a state habeas petition in the *Superior Court* has suffered a final decision for the purposes of applying res judicata. *People v. Egan,* 73 Cal. App. 2d 894, 898 (1946). As pointed out by *In re Crow,* 4 Cal. 3d 613, 621-622, 94 Cal.Rptr. 254 (1971) a Superior Court state habeas decision can be final *only* as to the State. This is so because a losing petitioner *may not* appeal an adverse Superior Court habeas petition; only the State may do so. *Id.* at 621, n. 8. A losing petitioner may, however, file successive (new) petitions on the same issues in the Court of Appeal and the Supreme Court. *Id. See also, In re Fain,* 139 Cal.App.3d 295, 301, 188 Cal.Rptr. 653 (1983). "[R]es judicata applies to a final judgment *granting* habeas corpus relief. . . . It does not follow, however, that res judicata principles apply . . . where an inmate has *unsuccessfully* attacked a [decision] in a habeas corpus proceeding."

By definition then, if the state courts do not view an 8 adverse decision for the petitioner as preclusive for the refiling of the same case, the federal courts should not either. *Migra,* 465 U.S. at 81, 88. Put even more simply, an

action is either precluded from re-litigation, or it is not; there is not a logical middle ground. The Attorney General's contention that plaintiff's action here is barred because of the preclusive effects of a final state decision, which is not really final under state law, is a legal oxymoron.[36]

Defendants' argument fails for several reasons. First, even if the Superior Court's denial of plaintiff's habeas petition had not been vacated by the Court of Appeal – that is, even if the Superior Court's determination on the merits of the petition stood – plaintiff would not be precluded from either filing another habeas petition or pursuing the instant civil rights action on the same issue.

Second, as exhaustively discussed above, the fact that plaintiff obtained a transplant is not determinative of his claim of deliberate indifference. As documented by this order, a number of factors apparently contributed to the delay in plaintiff obtaining a transplant and the ultimate decision to provide him a transplant, and it is these factors, rather than the fact of the transplant itself, that will be determinative of plaintiff's civil rights claim.

---

[36] The State may argue that the petitioner may only file another petition alleging the same issues as presented in the Superior Court habeas in the California appellate courts. However, such a contention would incorporate the habeas notion of exhaustion into § 1983 actions. The doctrine of exhaustion is not applicable for § 1983 plaintiffs. *Young v. Kenny*, 907 F.2d 874, 875 (9th Cir. 1990). There is no rule that a § 1983 plaintiff may not simply file his federal action after losing a Superior Court habeas action.

Third, the Superior Court order was vacated by the Court of Appeal's direction to reconsider the order. The Superior Court never revisited the issue before it. It therefore cannot be said that the vacated Superior Court order was "final" for purposes of res judicata. "[T]he usual procedure when a civil case becomes moot on appeal is to vacate the judgment below and remand with directions to dismiss the case. The reason for this is precisely to avoid giving preclusive effect to a judgment never reviewed by an appellate court." *New York City Emp. Ret. Sys. v. Dole Food Co.*, 969 F. 2d 1430, 1435 (2nd Cir. 1992) (citations omitted).

Accordingly, defendants' motion for summary judgment based on the res judicata effect of the March 19, 1986 Solano County Superior Court order in this case should be denied.

6. Qualified Immunity

Defendants assert (in their motion and at greater length in their reply brief) that their motion for summary judgment should be granted on the ground that "each and every defendant" is entitled to qualified immunity. Reply, at 18. The doctrine of qualified immunity shields "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982).

There are many consistent variations of the law set forth in *Harlow v. Fitzgerald*. The case of *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375, 1380-81 (9th Cir. 1989) states the correct analysis very well. A defendant is entitled to qualified immunity if:

> 1. the law allegedly violated was not clearly established (a legal issue) or;
>
> 2. assuming that the law was clearly established, a reasonable person would not have known that the law was clearly established (a mixed legal and factual issue) or;
>
> 3. assuming that the law was clearly established and should have been so recognized, would a reasonable person have known that he was violating that law under the factual circumstances of the case (a factual issue).

Accord, Romero v. Kitsap County, 931 F. 2d 624, 627 (9th Cir. 1991).[37]

As pointed out in *Hamilton v. Endell*, 981 F.2d 1062, 1066 (9th Cir. 1992), the concept of qualified immunity in an Eighth Amendment case is problematical. That is because "[a] finding of deliberate indifference necessarily precludes a finding of qualified immunity; prison officials who *deliberately* ignore the serious medical needs of inmates cannot claim that it was not apparent to a reasonable person that such actions violated the law." *Id.* The concept is no less problematical on summary judgment.

---

[37] Several cases in the Ninth Circuit have condensed the three part analysis into two parts. *Act up! Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1993). However, the test remains essentially the same.

Once plaintiff sets forth a factual prima facie case of deliberate indifference as described by the *Farmer v. Brennan* standards, i.e., akin to criminal recklessness, how can defendants allege that the law precluding such acts was not "clearly established?" If the facts are egregious enough to qualify for deliberate indifference, the court can conceive of very few, if any, circumstances where reasonable officials could have debated that their actions were somehow still allowed by *any* description of the law. The facts of this case illustrate the point.

Assuming that the experts agree that from 1981 through April 1985, plaintiff was viewed as noncompliant, and that there is a bona-fide dispute in expert opinion whether live donor transplants should be allowed for a noncompliant patient, plaintiff has simply failed to state a claim for an Eighth Amendment violation. An analysis of qualified immunity is superfluous because defendants will prevail on the merits. On the other hand, once plaintiff has set forth evidence that raises a material issue of fact that defendants were deliberately indifferent in delaying his transplant for two years after he was considered compliant, no reasonable person could argue that an ambiguity in the law could excuse officials who ignored suffering or a known medical risk with actual knowledge of the consequences of their action. By definition, the law is not ambiguous in the light of those facts.

Defendants are simply wrong in their belief that the law alleged to have been violated for qualified immunity purposes as being not "clearly established" is defined with such specificity that it can be stated here as the "law of kidney transplants," and that defendants were free to

ignore defendant's suffering or known medical risks with actual knowledge of the consequences because there has not been settled case law dealing with kidney transplant cases involving noncompliant patients. The clearly established law to be analyzed is that stated by *Hammond* above. Again, in an Eighth Amendment context, the facts are generally controlling in determining if a violation of law has taken place because the law is not difficult to determine given the egregiousness or lack thereof of the facts.[38]

Defendants' argument on qualified immunity must fail.

---

[38] The court has struggled with the concept of qualified immunity in the Eighth Amendment context. However, there are conceivable situations where it might exist. For example, the law on whether budget constraints can excuse noncompliance with otherwise mandatory, Constitutional medical duties is probably not clearly established. If the factual context of defendants' qualified immunity was the inability to give a transplant because of budgetary constraints, or prioritizing of medical services (conceded to be not the case here), perhaps this ambiguity in general Constitutional law might excuse the failure to give a transplant, at least with respect to damages actions against prison officials in their individual capacity. However, the same question is just as easily resolved on the merits; that is, if the prison officials were prioritizing medical services in good faith based on a budget that was out of their control, in all probability those prison officials have not acted with any culpable state of mind. Rather the officials have acted purposefully, but with no indifference as that term is defined.

CONCLUSION

For the reasons set forth above, this court recommends that defendants' motion for summary judgment be:

1. GRANTED as to all remaining defendants with respect to an alleged Eighth Amendment violation of delaying plaintiff's transplant during the time period (approximately) 1981- April 1985;

2. GRANTED as to all defendants' EXCEPT Drs. *McIntosh* and *Victorino* with respect to an alleged Eighth Amendment violation of delaying plaintiff's transplant during the time period April 1985-February 1987; the motion with respect to defendants *McIntosh* and *Victorino* should be denied;

3. GRANTED as to all defendants with respect to all other claims of medical treatment deliberate indifference, excepting the damages claim for diet deprivation (*see*, below);

4. GRANTED as to all defendants with respect to conspiracy claims pursuant to 42 U.S.C. § 1985(3), and 18 U.S.C. §1001;

5. GRANTED as to all defendants with respect to injunctive relief claims for proper diet; be DENIED with respect to defendants McIntosh and Thor with respect to damages claims for lack of proper diet;

6. DENIED insofar as defendants base their motion for summary judgment on res judicata or qualified immunity.

In summary, the only claims and defendants left for trial are those expressly referenced above as remaining in the case.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. . . . 636(b)(1). Within ten (10) days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten (10) days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: July 22, 1994.

/s/ Gregory G. Hollows
GREGORY G. HOLLOWS
U.S. Magistrate Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RAYMOND D. JACKSON, SR.,
Plaintiff,
vs. No. CIV S-90-0760 EJG GGH
DUNCAN McINTOSH, et al.,
Defendants.
_____/

RAYMOND D. JACKSON, SR.,
Plaintiff,
vs. No. CIV S-91-1624 EJG GGH
EDDIE YLST, et al., ORDER
Defendants. (Filed Aug. 30, 1994)
_____/

Plaintiff, a state prisoner proceeding pro se, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On July 25, 1994, the magistrate judge filed findings and recommendations herein which were served on plaintiff and which contained notice to plaintiff that any objections to the findings and recommendations were to be filed within thirty (30) days. On August 10, 1994, defendants filed timely objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 305, this court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendations filed July 25, 1994, are adopted in full; and

2. Defendants' motion for summary judgment is:

a. GRANTED as to all remaining defendants with respect to an alleged Eighth Amendment violation of delaying plaintiff's transplant during the time period (approximately) 1981-April 1985;

b. GRANTED as to all defendants, EXCEPT Drs. *McIntosh* and *Victorino* with respect to an alleged Eighth Amendment violation of delaying plaintiff's transplant during the time period April 1985-February 1987; the motion with respect to defendants *McIntosh* and *Victorino* is denied;

c. GRANTED as to all defendants with respect to all other claims of medical treatment deliberate indifference, excepting the damages claim for diet deprivation (*see*, below);

d. GRANTED as to all defendants with respect to conspiracy claims pursuant to 42 U.S.C. § 1985(3), and 18 U.S.C. § 1001;

e. GRANTED as to all defendants with respect to injunctive relief claims for proper diet; is DENIED with

respect to defendants McIntosh and Thor with respect to damages claims for lack of proper diet;

f. DENIED insofar as defendants base their motion for summary judgment on res judicata or qualified immunity.

In summary, the only claims and defendants left for trial are those expressly referenced above as remaining in the case.

DATED Aug 26, 1994.

/s/ Illegible
UNITED STATES
DISTRICT JUDGE

APPENDIX E

WHEN YOUR KIDNEYS FAIL

REVISED SECOND EDITION

A Handbook for Patients and Their Families

Mickie Hall Faris, M.P.H., M.B.A.

NATIONAL KIDNEY FOUNDATION
OF SOUTHERN CALIFORNIA
5777 W. Century Blvd., Suite 395
Los Angeles, California 90045

* * *

What happens if both kidneys fail?

If both kidneys fail to function, then ongoing medical treatment is needed. This treatment can be either some form of dialysis or it can be kidney transplantation.

* * *

What is dialysis?

The terms 'dialysis' and 'artificial kidney treatment' have the same meaning. It is a form of medical treatment which removes the body's wastes directly from the blood of people who have lost kidney function. Dialysis replaces some of the functions that the kidneys can no longer perform. There are two forms of dialysis: hemodialysis and peritoneal dialysis.

What is hemodialysis?

Hemodialysis is a form of dialysis that uses an artificial kidney machine (dialysis machine) to remove fluids and waste products from the bloodstream. An access device is implanted in the arm or leg, and blood is taken from an artery through a needle which has been inserted into the access device. A tube is attached to the access device and is carried to the dialysis machine. Your heart pumps blood with the assistance of a blood pump through the tube to the machine, where it is cleansed by running through a dialyzer (artificial kidney) and returned to your body through a tube and then through a needle which has been inserted into a vein. The blood is continuously circulated, a pint at a time through the dialyzer until the treatment has been completed. Hemodialysis is explained in greater detail in Chapter 3.

What is peritoneal dialysis?

Peritoneal dialysis is another method of removing waste and fluid from your body. However, instead of using an artificial kidney as in hemodialysis, the lining of your abdominal cavity is used. A peritoneal dialysis catheter is surgically implanted in your abdomen below the navel. A specially prepared solution called

peritoneal dialysate is set into the abdomen through the catheter. After a specified length of time, the used dialysate is allowed to flow out of the abdominal cavity through the catheter. Fresh dialysate is sent back in and the procedure is repeated. This procedure, known as a solution exchange, is repeated several times a day. See Chapter 4 for additional information.

What is kidney transplantation?

Another major treatment for kidney failure is kidney transplantation. This involves removing a kidney from either a living relative of the patient or from an unrelated deceased person and surgically placing the new kidney into the patient. See Chapter 5 for additional information.

* * *

How many people receive dialysis treatment?

Today there are over 95,000 people being treated with artificial kidney treatment in the United States alone.

How long can I live while receiving dialysis treatment?

Kidney failure is no longer a terminal illness. There are people in the United States who have been receiving treatment for over 20 years. No one can tell you how long you will live on dialysis. If you have no medical problems

other than kidney failure, you should have a longer life expectancy than someone who has other chronic medical problems in addition to receiving dialysis treatment.

* * *

APPENDIX F

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

RAYMOND D. JACKSON, Plaintiff/Appellee, v. DUNCAN McINTOSH, et al., Defendants/Appellants.	)	No. 94-16741 [D.C. No. CIV S90-0760 EJGGGH]
RAYMOND D. JACKSON, Plaintiff/Appellee, v. EDDIE YLST, et al., Defendants/Appellants.	)	[D.C. No. CIV S91-1624 EJGGGH]

On Appeal From The United States District Court
For The Eastern District Of California
Nos. CIV S-90-0760 & CIV S-91-1624

Edward J. Garcia, United States District Judge

DEFENDANTS' OPENING BRIEF

DANIEL E. LUNGREN, Attorney General of the State of California
GEORGE WILLIAMSON, Chief Assistant Attorney General
CONSTANCE PICCIANO, Assistant Supervising Deputy Attorney General

WILLIAM V. CASHDOLLAR
Deputy Attorney General
Attorneys for Defendants
Drs. McIntosh and Victorino

Dated: December 29, 1994

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UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

RAYMOND D. JACKSON,	)	No. 94-16741
Plaintiff/Appellee,	)	[D.C. No. CIV S90-0760 EJGGGH]
v.	)	
DUNCAN McINTOSH, et al.,	)	
Defendants/Appellants.	)	

RAYMOND D. JACKSON,	)	
Plaintiff/Appellee,	)	
v.	)	[D.C. No. CIV S91-1624 EJGGGH]
EDDIE YLST, et al.,	)	
Defendants/Appellants.	)	

On Appeal From The United States District Court
For The Eastern District Of California
Nos. CIV S-90-0760 & CIV S-91-1624

Edward J. Garcia, United States District Judge

DEFENDANTS' OPENING BRIEF

STATEMENT OF ISSUES

Whether the district court erred in denying qualified immunity to defendant physicians faced with a prison inmate exhibiting a continuous pattern of noncompliance[1] with medical and treatment instructions.

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[1] A medically noncompliant person is one who, in the face of medical advice, chooses a course of conduct in conflict with that advice. For example, repeatedly not arriving at all for dialysis treatment, repeatedly arriving late for dialysis treatment, repeatedly leaving early from dialysis treatment, repeatedly not taking medications, repeatedly not following a prescribed diet, repeatedly refusing/failing to allow monitoring of one's condition, including blood pressure, temperature, etc., repeatedly manipulating dialysis equipment when told not to, repeatedly being disruptive and manipulative, fighting with other inmates, repeatedly "cheeking" or hording medications, and repeatedly eating in a regular dinning hall, when assigned to eat in a diet kitchen.

STATEMENT OF JURISDICTION
[Circuit Rule 28-2.2]

A. District Court Subject Matter Jurisdiction

The District Court for the Eastern District of California invoked its jurisdiction over the subject matter of this case under the provisions of 28 U.S.C. § 1343(a)(3) and (4).

B. Appellate Jurisdiction

This Court has jurisdiction because the district court denied defendants' qualified immunity claim and such denial is an appealable interlocutory order pursuant to 28 U.S.C. § 1292(b). Qualified immunity is a purely legal question, which must be decided *de novo* by the Court of Appeal. *Mitchell v. Forsyth,* 472 U.S. 511, 528 (1985).

C. Timeliness of Appeal

Defendants are appealing the District Court's order of August 30, 1994. CR-2, 191.[2]

Defendants filed their notice of appeal on September 14, 1994. CR-2, 193.

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[2] Prior to consolidation and referring to the consolidated cases as D.C. No. CIV S-90-0760, there existed two cases and thus two Clerk's Records below: D.C. No. CIV S-90-0760 EJG GGH P and D.C. No. CIV S-91-1624 EJG GGH P. Defendants shall refer to the first Clerk's Record as CR-1 and the second Clerk's Record as CR-2, to avoid confusion. Thus, CR-1, 144, pp. 48-53, refers to D.C. No. CIV S-90-0760 EJG GGH P, Dr. Levin's deposition transcript, at pages 48 through 53.

The notice of appeal was timely filed pursuant to Federal Rules of Appellate Procedure, Rule 4, subdivisions (a)(1) and (2); Federal Rules of Civil Procedure, 28 U.S.C. §§ 1291 and 1292(b); and *Mitchell v. Forsyth*, 472 U.S. at 528.

D. The Standard of Review

The Court of Appeals reviews a district court's grant or denial of summary judgment de novo, viewing the evidence in the light most favorable to the non-moving party, to ascertain whether there exists any genuine issues of material fact. *Lockary v. Kayfetz*, 908 F.2d 543 (9th Cir. 1990); *Los Angeles Police Protective League v. Gates*, 907 F.2d 879 (9th Cir. 1990).

Likewise, the Court reviews a denial of summary judgment on the ground of qualified immunity de novo. *Lum v. Jensen*, 876 F.2d 1385, 1386 (9th Cir. 1989); *Tibble v. Gardner*, 860 F.2d 321, 323 (9th Cir. 1988). Moreover, qualified immunity is a purely legal question, which must be decided *de novo* by the Court of Appeals. *Mitchell v. Forsyth*, 472 U.S. at 528. The court does not consider the correctness of either party's version of the facts or whether the complaint states a claim for relief. Review is limited to ascertaining whether, as a matter of law, the right claimed to have been violated was clearly established at the time that the alleged constitutional violation occurred. *Id.* If the law was clearly established, the court must then consider whether the officials' conduct was objectively reasonable. *Harlow v. Fitzgerald*, 457 U.S. 800 (1981).

STATEMENT OF THE CASE
[Fed. Rules App. Proc. 28(a)(4).]

The instant consolidated case is a fusion of two separate civil rights actions filed pursuant to 42 U.S.C. § 1983. These complaints were filed on June 13, 1990 (CIV S-90-0760 EJG GGH P) and November 26, 1991 (CIV S-91-1624 EJG GGH P) respectively.

1. Case CIV S-90-0760 EJG GGH

This first action was filed by plaintiff Raymond D. Jackson, Sr., on June 13, 1990, as a civil rights action pursuant to 42 U.S.C. § 1983. The complaint names two defendants, each an employee of the California Department of Corrections (CDC). The defendants named are Dr. Duncan McIntosh, a consulting nephrologist[3] and Director of the Hemodialysis Unit at the California Medical Facility (CMF), and Dr. Daniel Thor, Chief Medical Officer at California Medical Facility (CMF), at the time pertinent to this case. CR-1, 1.

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[3] A nephrologist is a physician who, in part, studies and has clinical experience in the areas of kidney disease, kidney failure, and treatment. There are four nephrologists with knowledge of the case before the Court. They are: (1) Dr. Barry Levin (a San Francisco physician, working at the Presbyterian Medical Center (PMC – a transplant center where plaintiff received his transplant) who cared for plaintiff in 1987 at the time of plaintiff's transplant); (2) Dr. David Sherman (a Glendale, California, physician who cared for plaintiff between 1979-80 prior to plaintiff's incarceration in state prison); (3) Dr. Martha Graber (plaintiff's expert) and Dr. Duncan McIntosh (defendant). Drs. Levin and Sherman are testifying experts on behalf of defendants.

On August 29, 1990, defendants filed their answer to the complaint. CR-1, 17

On December 5, 1991, defendants filed a motion for summary judgment. CR-1, 72.

On September 11, 1992, the Magistrate Judge, issued his Findings and Recommendations in response to defendants' motion for summary judgment. The Magistrate Judge recommended that the motion be granted in part and denied in part. The Magistrate Judge recommended denial of defendants' motion as to deliberate indifference relating to plaintiff's transplant demand. It was recommended that the motion be granted as to the issues involving allegations of retaliation and anti-rejection medication. CR-1, 98.

On September 29, 1992, defendants filed a motion for judgment on the pleadings pursuant to Federal Rules of Civil Procedure 12(c), on the subject of plaintiff's claim that he had a constitutional right to a kidney transplant. Defendants, in part, pointed out that prison inmates do not possess an entitlement to receive organ transplants, any more than members of the public throughout America do not have a constitutional right to a kidney transplant. Defendants further argued that a denial of a desired extraordinary medical treatment in the form of a kidney transplant, did not implicate the Eighth Amendment. It was pointed out that hemodialysis is a medically approved method of treatment "reasonably commensurate with modern medical science and . . . a quality acceptable within prudent professional standards," as required by case law. CR-1, 101.

On November 10, 1992, the Magistrate Judge recommended denial of defendants' motion for judgment on the pleadings. CR-1, 104.

On November 23, 1992, the District Judge adopted in full the Magistrate Judge's Findings and Recommendations relating to defendants' motion for summary judgment. CR-1, 105.

On January 13, 1993, the District Judge adopted in full the Magistrate Judge's Findings and Recommendations relating to defendants' motion for judgment on the pleadings. CR-1, 112.

On August 11, 1993, the Court appointed counsel for plaintiff. CR-1, 124.

2. Case CIV S-91-1624 EJG GGH P

This second and related action was filed by plaintiff Raymond D. Jackson, Sr., on November 26, 1991, under 42 U.S.C. § 1983. The complaint names fifteen defendants. The defendants included Dr. Duncan McIntosh, a consulting nephrologist and Director of the Hemodialysis Unit at the California Medical Facility (CMF); Dr. Daniel Thor, Chief Medical Officer at California Medical Facility (CMF) at the time pertinent to this case; Dr. Poulos; Bobby Crump; Eddie Ylst, the Warden at CMF pertinent to the time period of this case; IvaLee Henry, Chief Deputy Warden at the time pertinent to a portion of these incidents; Cathy Lambert; Nancy Erly; Nancy Friedline; Jack Downing; John Goodman; Dr. David Victorino; Nancy Champion; Dr. Carl Bourne; and prior inmate Balil Ibn Muhammad. CR-2, 1.

Process was subsequently authorized against all defendants, but Thor and Bourne.

On May 18, 1992, defendants Ylst, Henry, McIntosh, Lambert, Erly, Friedline, Downing and Goodman filed a request to file a late answer and an answer to the complaint. CR-2, dated May 18, 1992.[4]

On September 3, 1992, the court dismissed defendant Muhammad from the case. CR-2, 33.

On October 29, 1992, the Magistrate Judge issued Findings and Recommendations recommending that defendant Champion be dismissed from the case. CR-2, 35.

On December 31, 1992, defendants Poulos and Crump filed their answer to the complaint. CR-2, 39.

On January 4, 1993, the Court adopted in full the Magistrate Judge's Findings and Recommendations issued on October 29, 1992, dismissing defendant Champion from the case. CR-2, 38.

3. Cases Consolidated

On October 12, 1993, the Court consolidated the above entitled two cases for trial and issued a new scheduling order. CR-2, 53; CR-1, 129.

On October 12, 1993, the district court appointed plaintiff counsel. CR-1, 129; CR-2, 53.

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[4] No CR sequence was provided.

4. Motion For Summary Judgment – Consolidated Cases

On April 11, 1994, defendants filed a motion for summary judgment. CR-1, 136.

On July 25, 1994, the Magistrate Judge issued Findings and Recommendations, denying in part and granting in part, defendants' motion. As applicable here, the Magistrate Judge denied defendants' motion on the grounds of qualified immunity.[5] CR-1, 186.

On August 30, 1994, the District Judge adopted in full the Magistrate Judge's Findings and Recommendations, thereby denying defendants' motion on the grounds of qualified immunity. CR-1, 191.

STATEMENT OF MATERIAL FACTS

Plaintiff, a California State Prison inmate, is serving a sentence of life imprisonment. CR-1, 72, Exhibit 2. Since March 3, 1981, and continuing to the present, plaintiff has been incarcerated by the California Department of Corrections. CR-1, 72 Exhibit 3.

In his civil rights complaints, plaintiff alleges that he arrived in state prison in 1981 with renal failure. CR-1, 1 and CR-2, 1, pp. 3 and 2:6 respectively. Plaintiff explains that he underwent dialysis treatment from 1981 until

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[5] The District Court restricted defendants' exposure to liability to include only that period of time from April 17, 1985, the date Dr. McIntosh first referred plaintiff's case to the transplant center (PMC), to the date of transplant, February 5, 1987. CR-1, 186, pp. 65:14-16; 66:1-2.

February 5, 1987, when he received a living-related[6] kidney transplant from his brother. CR-1, 1 and CR-2, 1, pp. 4 and 3-4, respectively. Plaintiff complains that he was required to undergo "unnecessary pain and suffering of the [h]emodialysis treatments. . . . " (CR1, 1 and CR-2, 1, pp. 3 and generally 4, respectively) and shunt operations to facilitate the dialysis treatments. CR-1, 1 and CR-2, 1, pp. 4 and 3 respectively. Plaintiff further contends that he suffered pain and medical complications during the intervening years between entry into prison in 1981 and his transplant operation on February 5, 1987 and that the delay in providing him with a kidney transplant constituted cruel and unusual punishment prohibited by the Eighth Amendment. CR-2, 1, pp. i, 2-6.

In Findings and Recommendations filed July 25, 1994 and an order filed August 30, 1994, the district court concluded that the period of time during which defendants are exposed to liability for not providing plaintiff with a kidney transplant referral, was limited to the period from April 17, 1985 to February 5, 1987. CR-1, 186 and 191.

There are two treatment options for patients with end-stage renal disease (ESRD): dialysis (hemodialysis or peritoneal dialysis) and transplantation. Plaintiff was provided and continuously maintained on dialysis treatment, until February 5, 1987, when he received a living-related kidney transplant from his brother.

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[6] There are two sources of kidneys: cadaver (from a recently deceased individual) and living-related (from a close relative). CR-1, 136, Exhibit 8, p. 51.

Thousands of people are maintained on hemodialysis for extended periods of time, even some up to twenty years, according to plaintiff's own expert witness, Dr. Graber.[7] See, e.g., CR1, 159, pp. 133:25; 134:1-5. Also, see CR-1, 72, Exhibit 4, pp. 3-4; CR-1, 72, Exhibit 5, p. 6.

The District court could not "find any[thing in Dr. Graber's] opinion . . . that asserts the dialysis treatments were characterized by deliberate indifference. CR-1, 186, p. 50:2-3.

Dr. Levin, a non-party and the sole person responsible for deciding when plaintiff could or should be transplanted, testified by way of declaration and during the taking of his deposition that, in his medical judgment, the timing of the transplant referral by Dr. McIntosh was proper and timely. See, e.g., CR-1, 136, Exhibit 4, pp. 2:7-23; 8:6-9. Dr. Levin further testified that he is familiar

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[7] Dr. Graber also testified that: (1) she would not refer a noncompliant patient for a cadaver transplant, CR-1, 159, pp. 96:23-25; 97:1-2); (2) plaintiff was non-compliant up to and including 1987, CR-1, 159, pp. 113:6-11; (3) she would *not* have provided plaintiff with a cadaver kidney transplant up to and including 1987, CR-1, 159, pp. 112:9-17; 112:25; 113:1-3); (4) the medical problems experienced by plaintiff (pruritus, pseudogout, anemia, pericarditis, disequilibrium syndrome, hypotension, etc., mentioned in plaintiff's Opposition To Defendants' Motion For Summary Judgment, CR-1, 158, pp. 7-9, were not unusual and did not reflect an error in medical judgment or care of plaintiff, CR-1, 159, pp. 154:1-162:1-10; and (5) the only concern the doctor had was that she believed plaintiff should have been referred to PMC earlier than April 17, 1985 for consideration of a living-related donor transplant. CR-1, 159, pp. 110:19-25; 111:1-2. Her concern however has become academic since the district court found no liability prior to April 17, 1985.

with the standard of medical care one would expect from a nephrologist and that Dr. McIntosh acted properly and in conformance with the standards of medicine with respect to his referral of plaintiff to him for transplant consideration.[8] CR-1, 136, Exhibit 4, pp. 2:16-23.

The Federal Bureau of Prisons does not provide kidney transplants to federal prison inmates. CR-1, 136, Exhibits 15 and 16.

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[8] "The established standard of care in California for physicians and surgeons requires that they exercise that degree of skill, knowledge, and care ordinarily possessed and exercised by other members of the profession acting under similar conditions and circumstances." *California Torts*, Levy, Golden, Sacks, General Standard of Care, § 31.11, p. 31-20.4, citing *Mackart v. Zeime*, 67 Cal.App. 363, 371 (1924). "The standard of care governing medical specialists requires the exercise of professional conduct normally exhibited by specialists in the same or similar locality under like circumstances." *California Torts*, Levy, Golden, Sacks, Standard of Care of Specialists, § 31.12, p. 31-21, citing *Quintal v. Laurel Grove Hospital*, 62 Cal.2d 154, 159-160 (1964); *see* BAJI 6.01 (1977 Revision). "When the matter in issue is within the knowledge of experts only and not within common knowledge, expert evidence is conclusive and cannot be disregarded. *Danielson v. Roche*, 109 Cal.App.2d 832 (1952); *California Jury Instruction – Civil*, (BAJI) 7th Edition, Medical Negligence – Standard of Care Determined by Expert Testimony, § 6.30, pp. 205-6, Comment, p. 206.

ARGUMENT

I DEFENDANTS DEMONSTRATED THEIR ENTITLEMENT TO QUALIFIED IMMUNITY APPLIED TO THEM BECAUSE THE LAW ALLEGEDLY VIOLATED WAS NOT CLEARLY ESTABLISHED AND DEFENDANTS ACTED IN AN OBJECTIVELY REASONABLE MANNER

In *Harlow v. Fitzgerald*, 457 U.S. at 818-819, the court reasoned that if the law was not clearly established at the time of the action in question, the defendant is entitled to immunity because an official could not reasonably be expected to "know" that the law forbade conduct not yet identified as unlawful. If, on the other hand, it is determined that the law was clearly established, whether an official is protected by qualified immunity generally turns on the "objective legal reasonableness" of the action. *Harlow* 457 U.S. at 819.

A. The Law Must Be Defined With Particularity When Determining If It Was Clearly Established For Purposes of a Qualified Immunity Defense

A determination of whether the law was "clearly established" requires that the right allegedly violated be identified with particularity. In *Anderson v. Creighton*, 483 U.S. 635 (1987), the court reasoned that the level of generality at which the relevant "legal rule" is identified impacts the usefulness of the standard.

> For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how

> unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow.* Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.

Anderson v. Creighton, 483 U.S. at 639-640.

The court found that to state the standard too broadly makes it impossible for officials reasonably to anticipate when their conduct may give rise to liability for damages, and thus the right must be clearly established in a more particularized and relevant sense. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. In other words, in the light of pre-existing law, the unlawfulness must be apparent. The court has reaffirmed this position in *Hunter v. Bryant,* 502 U.S. 224, 226 (1991). See also *Malley v. Briggs,* 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"); *Mitchell v. Forsyth,* 472 U.S. at 528 (officials are immune unless "the law clearly proscribed the actions" they took); *Davis v. Scherer,* 468 U.S. 183, 191 (1984).

In the present case, there is no known statute or case law clearly establishing that a nephrologist and Chief

Medical Officer (Drs. McIntosh and Victorino, respectively) must provide a medically noncompliant prisoner-patient with a kidney transplant in lieu of dialysis treatment. Indeed, there is no statute or case law requiring organ transplantation in lieu of dialysis.[9] Under the

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[9] In concluding there was no deliberate indifference by defendants in providing plaintiff with dialysis between March 1981 when he entered prison and April 17, 1985, when Dr. McIntosh wrote Dr. Levin, asking him to look at the case, the district court failed to recognize that its ruling effectively negated a finding of deliberate indifference from April 17, 1985, until February 5, 1987, when the transplant took place. The reason is, that in establishing an Eighth Amendment violation, a prison inmate must " . . . demonstrate that the treatment he has received falls below "minimal civilized" levels. . . . " *Fernandez v. U.S.*, 941 F.2d 1488 (11th Cir. 1991); citing *Wilson v. Seiter*, 501 U.S. 294, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). As the court went on to state in *Fernandez*, "[a]n inmate's entitlement to medical treatment "reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards" is undisputed. *United States v. DeCologero*, 821 F.2d 39, 43 (1st Cir. 1987). It is undisputed that dialysis satisfies the *Fernandez* standard. The district court must have agreed, otherwise the court would have denied defendants' motion for summary judgment for the four year period prior to April 17, 1985. Clearly, from entering state prison in March 1981 until April 17, 1985, plaintiff did not suffer a constitutionally "serious" medical condition mandating treatment (*Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 347 (3rd Cir. 1987); *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980) *cert. denied*, 450 U.S. 1041 (1981)) other than dialysis. Thus, it was irrational for the district court to suggest as it did, that in the short time between April 17, 1985, when Dr. McIntosh first asked Dr. Levin to look at plaintiff's case for transplant consideration, and February 5, 1987, when plaintiff was provided with a transplant, plaintiff's condition became one which he suffered a "serious" medical condition mandating

guidelines established by the Court in *Anderson v. Creighton*, the particularized question in this case is whether defendants violated clearly established law when plaintiff did not receive a transplant from the Presbyterian Medical Center (PMC) and Dr. Levin between April 17, 1985, when Dr. McIntosh first referred plaintiff, and February 5, 1987, when a transplant was granted and provided by Dr. Levin and PMC.

Plaintiff's challenge of defendants' conduct is that he was entitled under a constitutional litmus test to a transplant of a kidney once he complained of pain and medical complications.[10] However, given the extensive discretion accorded a nephrologist in determining when to refer a patient for transplant consideration, the question whether the law was clearly established must focus in some way

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treatment other than dialysis under the *Ramos* and *Monmouth* standards. And, since Levin rejected plaintiff as a transplant candidate due to his noncompliance following the April 17, 1985 letter, asking Levin to consider the facts presented, (CR-1, 144, pp. 48-53) there was nothing else for defendants to do. Consequently, in the absence of a "serious" medical condition mandating treatment beyond dialysis, there can be no finding of deliberate indifference for any period of time, including from April 17, 1985 to February 5, 1987.

[10] We have already been instructed by Dr. Graber that the medical problems experienced by plaintiff were not unusual and did not reflect an error in medical judgment or care of plaintiff. CR-1, 159, pp. 154:1 through 162:1-10; this brief, at fn. 7. Additionally, plaintiff's own counsel explained, "We're not claiming he [Jackson] was medically inappropriately cared for." CR-1, 159, p. 161:1-2.

on the particular right claimed, here, a right to a transplant *referral*.[11] We note that even when plaintiff was referred on April 17, 1985, he was rejected for transplantation by non-party Dr. Levin and PMC due to plaintiff's noncompliance. CR-1, 144, pp. 48-53.[12] Consequently, it is clear that there is no clearly established constitutional right to a transplant referral, let alone an organ transplantation between April 17, 1985 and February 5, 1987.

The District Court identified the right involved as the right to be free from cruel and unusual punishment secured by the Eighth Amendment. See, e.g., CR-1, 186,

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[11] Plaintiff is compelled to concede that Drs. McIntosh and Victorino do not make transplant (surgical) decisions. Only transplant nephrologists, such as Dr. Levin, make such decisions. Therefore, the only credible legal right claimed as to Drs. McIntosh and Victorino, is that plaintiff was constitutionally entitled to a referral to a transplant physician or center, something he received from Dr. McIntosh on April 17, 1985 and again, in late 1986. In the interim between the April 1985 referral and February 1987 transplant, plaintiff's prospective donors became unavailable. CR-1, 136, p. 60:7-16; fn. 36; CR-1, 175, p. 191; CR-1, 136, Exhibit 7. More significantly however, until he improved and was again referred in late 1986, plaintiff was noncompliant. See, e.g., CR-1, 159, pp. 96:23-25; 97:1-2; 112:9-17; 112:25; 113:1-3; 113:6-11. Indeed, plaintiff's own expert concedes that he was noncompliant the *entire* time. CR-1, 159, pp. 113:6-11.

[12] Dr. Graber acknowledges the excellent reputation Dr. Levin has in the San Francisco medical community. "Q. Do you know Dr. Levin, Barry Levin? A. No. Q. Do you know him professionally? A. I know him by reputation. I've never met him, and I've never worked with him on the same patient. Q. What is his reputation? A. He has an excellent reputation." CR-1, 159, p. 177:12-18.

pp. 4:1-6; fn 1; 15:1323; 18:18-22. However, such a broad statement of the right in question frames it in a way to establish a rule of virtually unqualified liability denounced in *Anderson v. Creighton*. If the district court had properly framed the question of clearly established law in a particularized way, then it would have reached the determination that the law did not clearly require that ESRD inmate-patients must receive a kidney transplant referral or transplantation, and defendants would be entitled to qualified immunity.[13]

Persons on public assistance have been found to have no constitutional right to organ transplantation. Therefore, merely because a person is incarcerated, that person earns no greater entitlement than that found in the general population.[14] Defendants are entitled to qualified

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[13] Defendants have found no case concluding that failure to provide an inmate a kidney transplant in lieu of dialysis constitutes "deliberate indifference" and thus, a violation of the Eighth Amendment. Indeed, plaintiff advances no such case nor statutory authority.

[14] Persons on public assistance do not constitutionally have an absolute right to receive an organ transplant to remedy a serious medical condition. Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 et seq., the so-called "Medicaid Statute," provides for federal grants to enable states to provide medical care to person whose income and resources are insufficient to meet the costs of necessary medical services. *See, Meusberger v. Palmer,* 900 F.2d 1280 (1990). In granting money for medical purposes, Congress did not mandate that the funding be used for organ transplants. Under the 1987 Congressional amendments to the Act, the states were given discretion whether to cover organ transplants. *Dexter v. Kirschner,* 984 F.2d 979 (9th Cir. 1993). "The statute applicable to payments for organ transplants, 42 United States Code, section 1396b(i)

immunity as there is no statute or case mandating transplant referral or transplantation in lieu of dialysis.

(1992), does not make payments mandatory. Section 1396b(i) states only what must occur in the event a state should decide, in its discretion, to pay for organ transplants." *Dexter*, 984 F.2d at p. 983. Accordingly, thousands of disadvantaged persons, who reside, or have, in the past, resided in a state that did not adopt a program permitting organ transplants were required to undergo dialysis treatment. Issues such as a preference for a transplant or pain and suffering were and remain irrelevant. "In 1990, only forty state Medicaid programs included funding for heart transplants and only thirty-eight states funded liver transplants in adults. 45 Vand.L.Rev. 977, fn 100, citing Spencer Rich, Organ Transplants: *Rationing by Wallet?*, Wash. Post (Sept. 1, 1991.) "In 1982, California dropped 270,000 people from its Medicaid program so that the state could continue to fund organ transplants. A subsequent study monitored the health of 186 people who lost coverage and compared it to the health of 186 people who did not lose coverage. On the first year, seven of those who had lost coverage died, compared to zero in the group who had coverage." 45 Vand.L.Rev. 977. "[I]n 1987, Oregon legislators amended the state Medicaid program to cease covering organ transplants." 43 Hastings L.J. 947. Under the provisions of Medi-Cal, California provides organ transplants in appropriate circumstances, but only with funding from the federal government by way of medicaid grants. The right to receive an organ is not an entitlement guaranteed by the United States Constitution. The Eighth Circuit in *Ellis v. Patterson*, 859 F.2d 52 (8th Cir. 1988) determined that organ transplants need not be covered by Medicaid because organ transplants are not among the services that must be provided under Medicaid. *Dexter*, 984 F.2d at p. 983 (" . . . Congress intended the states to have discretion whether to include organ transplants in the Medicaid plans.") In *Meusberger v. Palmer*, 900 F.2d at 1282, the court reasoned that "[t]his court has held that state Medicaid plans need not fund organ transplants, even when they are 'medically necessary.' States may elect which, if any, organ transplants to cover." *Id.*, citing *Ellis*.

B. An Official Is Entitled To Qualified Immunity Where His Conduct Is Objectively Reasonable

Assuming, *arguendo*, that the court below correctly determined that the law *was* clearly established, the court was then required to consider whether the action of plaintiffs was "objectively reasonable." If defendants' action was objectively reasonable, qualified immunity applies. *Harlow v. Fitzgerald*, 457 U.S. at 818. In the present case, if a reasonable nephrologist could have believed that an ESRD patient treated with dialysis was not under constitutional standards entitled to a kidney transplant referral or transplantation, then qualified immunity applies.

Dr. Levin, the transplant facility nephrologist at PMC, and the sole person who makes the decision if and when to transplant and who cared for plaintiff in 1987 at the time of the transplant, found Dr. McIntosh's conduct in referring plaintiff timely, proper and in conformance with community medical standards. CR-1, 136, Exhibit 4, pp. 2:16-23. Additionally, Dr. Sherman, who cared for plaintiff prior to plaintiff's incarceration, opined that

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There are numerous persons within this nation who suffer from serious illnesses. Many require organ transplants to remain alive. "Nationally, over 20,000 persons are in need of organ transplants. In California, approximately 2,000 people await donations of organs, such as hearts, kidneys, or livers." California Health and Safety Code, section 7160(d). Not all persons receive organ transplants. The fact that plaintiff in this case is incarcerated should not result in a greater right to receive extraordinary medical treatment than those who are not incarcerated. There is no greater entitlement to an organ transplant because the person is incarcerated, or is incarcerated in a California prison, as opposed to a federal prison, than free people in our society.

plaintiff probably would not have received a referral from him due to plaintiff's pattern of noncompliance, even in 1987, when plaintiff did receive a transplant. CR-1, 177, pp. 53-55; 52-76. Thus, according to expert testimony, the "standard" of medical care in which defendants' conduct must be tested was not breached.

The question for this Court is whether the conduct of defendants was objectively reasonable or, was the conduct in not providing plaintiff with a kidney transplant referral earlier such that defendants should have known that their conduct was unlawful at the time. Could a reasonable nephrologist believe that his decision not to refer a patient for transplant referral earlier, when the patient was provided with on-going and constitutionally adequate dialysis treatment consistent with "minimal civilized" levels of care (*Fernandez v. U.S.*, 941 F.2d 1488 (11th Cir. 1991), citing *Wilson v. Seiter*, 501 U.S. 294, (1991)), was violating clearly established law? The answer is an uncomplicated no. A reasonable nephrologist would not under the circumstances conclude that what he was doing was violating the law and qualified immunity applies. The experts agree.[15]

Could a reasonable physician have thought he was acting in accordance with the constitutional provisions against cruel and unusual punishment in exercising his discretion not to refer a noncompliant patient for transplantation? Could a reasonable physician have thought

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[15] That is, Drs. Levin, Sherman and McIntosh agree. Dr. Graber appears to agree in part.

he was acting in accordance with the constitutional provisions against cruel and unusual punishment in providing dialysis treatment in lieu of transplantation? The doctrine of qualified immunity provides "ample room for mistaken judgments" because it protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs* 475 U.S. at 343; quoted in *Hunter v. Bryant*, 502 U.S. at 224. There is no showing that defendants are "plainly incompetent", nor that they "knowingly violated the law."

The district court erred in failing to determine the objective legal reasonableness of defendants' conduct.

II

THE DOCTRINE OF QUALIFIED IMMUNITY REQUIRES THAT A COURT DETERMINE THE OBJECTIVE LEGAL REASONABLENESS OF AN OFFICIAL'S ACTION WHEN A PRISONER CHALLENGES CONDITIONS OF CONFINEMENT

The district court erred in finding that defendants must first admit deliberate indifference.[16] CR-1, 183, pp.

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[16] On June 2, 1994, during oral arguments on defendants' motion for summary judgment, defendants' counsel attempted to explain to the Magistrate Judge that with respect to defendant McIntosh and the others (including Dr. Victorino) regarding qualified immunity " . . . defendant McIntosh could not reasonably believe that he was violating any statutory or constitutional right" (CR-1, 183, p. 34:5-8) in denying plaintiff a kidney transplant referral earlier. The Magistrate Judge responded, that what you have "to do in qualified immunity – and I'll speak generic of the attorney general's office – is you always make the error in saying, I didn't do anything wrong.

34:17-25; 35:1. Moreover, the district court's implied finding that in the context of the Eighth Amendment[17] an

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My people didn't do anything wrong. What you need for qualified immunity is saying, yeah, assume his constitutional rights were violated. The law was not so clearly established at that time that a reasonable person should have known I was violating the law. But you have to make that up-front assumption that the law was violated, at least in hindsight. CR-1, 183, pp. 34:17-25; 35:1. In the district court's Findings and Recommendations, (CR-1, 186, at p. 63:8; 11-12, in reliance on *Hamilton v. Endell*, 981 F.2d 1062, 1066 (9th Cir. 1992) the Magistrate Judge wrote, "[a] finding of deliberate indifference necessarily precludes a finding of qualified immunity . . . " The Magistrate Judge added, "[o]nce plaintiff sets forth a factual prima facie case of deliberate indifference as described by the *Farmer v. Brennan* [1994 U.S. Lexis 4274] . . . akin to criminal recklessness . . . how can defendants allege that the law precluding such acts was not 'clearly established?' " CR-1, 186, p. 63:17-21. The Magistrate Judge's invitation and the District Judge's adoption is easily addressed. First, plaintiff did not made a prima facie case of deliberate indifference. Second, the Magistrate Judge overlooked the presence of clear evidence to explain that plaintiff was *not* compliant the entire time from 1985-1987, but was only moderately compliant in early 1985, until his siblings were no longer available. Moreover, to the extent that plaintiff, or the District Court suggested that it was defendants' obligation to pursue the siblings' status, notwithstanding plaintiff's own statements that his possible donors were no longer available, (CR-1, 136, p. 60:7-16; fn. 36; CR-1, 175, p. 191; CR-1, 136, Exhibit 7) such a position is unreasonable when it is recognized that it is Dr. Levin's/PMC's responsibility to contact and workup potential donors and to make the final decision whether or not to transplant a patient – *not* defendants.

[17] Defendants observe that the vast majority of prisoner civil rights cases concern conditions of confinement and thus involve an alleged violation of the Eighth Amendment. The effect of excluding the availability of qualified immunity in the

inquiry into the reasonableness of an official's conduct will almost always necessitate a factual inquiry requiring a jury determination, the district court commits error with respect to the understanding of the doctrine of qualified immunity.

The District Court suggests that a determination whether the official acted with deliberate indifference (the test established by *Wilson v. Seiter*) requires inquiry into the official's state of mind. The district court found that a genuine issue of fact prevents a determination of qualified immunity at the summary judgment stage in this case, indicating that a defendant's state of mind must indicate deliberate indifference to a prisoner's needs and thereby negating defendants' right to a finding of qualified immunity.

The lower court decisions seem to insist that within an Eighth Amendment context disputed facts will invariably arise and prevent resolution of qualified immunity prior to trial. The court's reasoning is that once a prima facia case for deliberate indifference is plead, the case must go to trial. That is precisely what the district court has found here. CR-1, 186, p. 63:17-21. The court assumes deliberate indifference (based on plaintiff's factual allegations), making it impossible to ever decide at the summary judgment stage that the official has acted in an

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context of the Eighth Amendment means that as a general rule prison officials would be subject to the burdens of litigation that the doctrine is meant to avoid. In light of the frequency with which prison officials are sued by inmates housed in the institutions to which such officials are assigned, the court is asked to carefully consider the impact of such exclusion.

objectively reasonable manner since deliberate indifference can never be "reasonable." Consequently, in an Eighth Amendment context where the standard for establishing liability is deliberate indifference, actions can never be found to be reasonable as a matter of law at the summary judgment stage, and an official can never be entitled to the benefit of qualified immunity. Such a position is simply illogical and so inflexible in the context of a qualified immunity claim as to destroy the doctrine altogether.

The Supreme Court has recently made it abundantly clear that government officials performing discretionary functions are to be given qualified immunity *except* where they knowingly violate the law. In *Elder v. Holloway*, ___ U.S. ___, 114 S.Ct. 1019, 1021 (1994), requiring an appellate court reviewing qualified immunity to consider all relevant precedents, not simply those cited to or discovered by the district court, the Court made it clear that technicality will not be utilized to limit the reach of qualified immunity. *Elder* reiterated that qualified immunity's central objective is to protect public officials from undue interference with their duties and from potentially disabling threats of liability. The Supreme Court instructing that this doctrine is to be utilized to the fullest extent, not selectively. Nowhere has the Supreme Court limited the use of qualified immunity to cases only involving questions of probable cause or reasonable suspicion (although it frequently arises in this context), and there is no basis for the District Court to so interpret the clear instruction of this court in *Hunter v. Bryant*. The reluctance of the district court to apply qualified immunity in the present case would seem to contradict the import of

the Supreme Court's position in *Elder* that the doctrine is not to be restricted. Instead, in its application, reviewing courts are to use all available resources.

In *Farmer v. Brennan*, ___ U.S. ___, 114 S.Ct. 1970 (1994), the court held that a prison official can be found liable under the Eighth Amendment for denying humane conditions of confinement only if he knows of and disregards an excessive risk of harm. The court emphasized that an official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. Thus, it is reiterated that there is a subjective requirement to the determination of deliberate indifference. However, *Farmer* at p. 1983 also instructs that "[w]hether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause."[18]

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[18] Under the reasoning in the recent Supreme Court case of *Farmer*, a prison official can be found liable under the Eighth Amendment only if he knows of and disregards an excessive risk of harm to plaintiff. "We hold . . . that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of an disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." The constitution outlaws cruel and unusual punishments, not cruel and unusual conditions. An official's "failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment."

A question remains regarding the relationship between a determination of deliberate indifference and qualified immunity. In *Farmer* and its predecessors the Supreme Court has lessened the burden on government officials who are alleged to have violated Eighth Amendment rights (by exhibiting deliberate indifference to serious needs or safety), in the course of their official actions. Under the standard articulated in *Farmer*, a greater degree of culpability is required for a finding of deliberate indifference than for the "objective reasonableness" of qualified immunity. Thus, if the questions are not separated in some way, *Farmer* would seem to alter the standard for qualified immunity within the Eighth Amendment context from one of objective reasonableness to subjective recklessness. In many cases this specific inquiry into mental state and actual knowledge might raise disputed issues of fact precluding a grant of qualified immunity by the court at an early stage in the proceedings. It seems odd to enunciate a standard which offers an official greater protection (i.e. that the official actually draw the inference that a substantial risk of harm exists) but generally requires a determination by the trier of fact, if that standard is meant to be applied in deciding qualified immunity since the court has instructed that such immunity is an immunity from suit and should be available to an official at the earliest possible stage in litigation. *Hunter v. Bryant*, 502 U.S. at 224.

Defendants believe that the district court misapplied the law and confuses two separate questions. When applying qualified immunity, the first inquiry is whether there is clearly established law governing the behavior in

question. If there is clearly established law which sanctions the behavior, or if the behavior is objectively reasonable within the context of clearly established law, qualified immunity is established and the case goes no further. Such behavior is placed within the framework of the most specific, relevant law governing the behavior. If the law is not specific enough to sanction the behavior, or if the behavior cannot be found as a matter of law to be "reasonable" given the particular circumstances of the case, the matter goes to trial. At trial *Farmer* directs a subjective evaluation of the official's state of mind. Unless the defendant has acted with subjective recklessness, he need not answer for the action, even though the clearly established relevant law is not specific enough to cover every aspect of the challenged behavior.

Thus, only if it is first determined that an official is *not* entitled to qualified immunity, does the court proceed to determine if the official is nonetheless entitled to judgment because plaintiff has failed to prove deliberate indifference. In the Eighth Amendment context, the court would determine (1) if the alleged deprivation was sufficiently serious and (2) if a defendant had the requisite culpable state of mind to establish liability. An official's state of mind is not at issue where the question is limited to qualified immunity. Instead, if it is determined that the law was clearly established at the time of the action in question, then the conduct of the official is evaluated in terms of *objective* reasonableness. If such conduct is objectively reasonable, qualified immunity applies. This approach would comport with the instruction in *Farmer*, that prison officials who act reasonably cannot be found liable.

Defendants exercised the "degree of skill, knowledge, and care ordinarily possessed and exercised by other members of the profession acting under similar conditions and circumstances," (Levy, Golden, Sacks, *California Torts*, General Standard of Care, § 31.11, p. 31-20.4, citing *Mackart v. Zeime*, 67 Cal.App. 363, 371 (1924)), measured by the "medical specialists . . . in the same or similar locality under like circumstances." Levy, Golden, Sacks, *California Torts*, Standard of Care of Specialists, § 31.12, p. 31-21, citing *Quintal v. Laurel Grove Hospital*, 62 Cal.2d 154, 159-160 (1964); *see* BAJI 6.01 (1977 Revision); also see, *Danielson v. Roche*, 109 Cal.App.2d 832 (1952); *California Jury Instruction – Civil*, (BAJI) 7th Edition, Medical Negligence – Standard of Care Determined by Expert Testimony, § 6.30, pp. 205-6, Comment, p. 206). Having satisfied the standards of medical care and practice in the community, a much lower standard than that found in *Farmer*, defendants are entitled to a pretrial finding of qualified immunity without having to admit liability.

CONCLUSION

Before this Court is a case wherein defendants were not violating clearly established law when plaintiff did not receive a kidney transplant referral as soon as plaintiff demanded. This is clear in the context of the discretion that must be exercised by such experts as Drs. Levin, Sherman, Graber and McIntosh and because there are no cases nor statutes prohibiting defendants' conduct – even ten years after the fact. Thus, the objective component is never reached. And, assuming it is reached, the overwhelming evidence is that the action of defendants was proper and met the standards of the medical community

as understood by the experts in the field – Dr. Levin and Sherman.[19]

For all of the foregoing reasons, the decision of the district court should be reversed and the district court ordered to grant plaintiff Drs. McIntosh and Victorino's motion for summary judgment on the ground of qualified immunity.

DATED: December 29, 1994

Respectfully submitted,

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[19] In fact, even Dr. Graber found defendants' conduct inferentially proper when she testified that she would not have referred plaintiff for a cadaver donor transplant consideration.

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

RAYMOND D. JACKSON, Plaintiff-Appellee, v. DUNCAN McINTOSH, et al., Defendants/Appellants.	)	No. 94-16741 [D.C. No. CIV S90-0760 EJGGGH]
RAYMOND D. JACKSON, Plaintiff/Appellee, v. EDDIE YLST, et al., Defendants/Appellants.	)	[D.C. No. CIV S91-1624 EJGGGH]

CERTIFICATION OF NO INTERESTED PARTIES
[Circuit Rule 28-2.1]

The undersigned, counsel of record for defendants, hereby certifies that there are no known interested parties other than those participating in the case who could be substantially affected by the outcome of this particular case.

DATED: December 29, 1994

Sincerely,

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DECLARATION OF SERVICE BY MAIL

Re: RAYMOND D. JACKSON, SR. V. DUNCAN A. MCINTOSH, et al.,
NO. CIV S-90-0760 EJG GJH P; and
RAYMOND D. JACKSON, SR. V. EDDIE YLST, et al.,
NO. CIV S-91-1624 EJG GJH P

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 944255, Sacramento, California, 94244-2550. I served a true copy of the attached

DEFENDANTS' OPENING BRIEF

On each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

ANTONIO PONVERT III
LAW OFFICE OF
AMITAI SCHWARTZ
155 MONTGOMERY
STREET, STE 800
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94104

U.S. DISTRICT COURT
EASTERN DISTRICT
650 CAPITOL MALL,
2ND FLR
SACRAMENTO, CA 95814

Each said envelope was then, on December 30, 1994 deposited in the United States mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 30, 1994, at Sacramento, California.

/s/ Lawrence A. Cook
Declarant